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Nos. 239, 240, and 248, Misc.

In the Supreme Court of the United States

OCTOBER TERM, 1948

KOKI HIROTA, PETITIONER

v.

GENERAL OF THE ARMY DOUGLAS MACARTHUR, ET AL.

KENJI DOIHARA, PETITIONER

v.

GENERAL OF THE ARMY DOUGLAS MACARTHUR, ET AL.

KOICHI KIDO, TAKAZUMI OKA, KENRYO SATO, SHIGETARO SHIMADA AND SHIGENORI TOGO, PETITIONERS

v.

GENERAL OF THE ARMY DOUGLAS MACARTHUR, ET AL.

ON MOTIONS FOR LEAVE TO FILE PETITIONS FOR WRITS OF HABEAS CORPUS

BRIEF IN OPPOSITION TO MOTIONS

INDEX

	Page
Statement	1
Summary of argument	5
Argument:	
I. This Court is without power to issue an original writ of habeas corpus since it has neither original nor appellate jurisdiction in this cause	24
A. This case is not within the original jurisdiction of this Court	24
B. Since military commissions do not exercise judicial power under Article III, Section 2, Clause 1 of the Constitution, this Court has no appellate jurisdiction to review or revise decisions of an international tribunal in the nature of a military commission	25
C. There is no potential jurisdiction over this cause in any court of the United States and thus no potential appellate jurisdiction in this Court	29
1. Under the present habeas corpus statute, no district court has power to issue a writ of habeas corpus where the person on whose behalf the writ is sought is not confined within the territorial limits of the court	30
2. Even if a district court's power to issue the writ depends merely on the presence within the jurisdiction of a respondent having effective control over the person detained, no American court has jurisdiction to issue the writ since there is in the United States no respondent who has effective custody and control of the petitioners	34
II. Petitioners are citizens of and residents in a foreign state, which is governed, not by the United States alone, but by the nations who together conquered Japan, and, therefore, petitioners have no standing to assert rights under the Constitution and laws of the United States	37

Argument—Continued

Page

III. Petitioners are being held pursuant to the judgment of an international tribunal the judgments of which are not subject to review on any ground by this Court or by any national court 40
A. The International Military Tribunal for the Far East is an international court acting under international agreement 40
1. The Department of State's certification should be accepted 40
2. The legal nature of the Tribunal 45
a. *The international control of Japan* 45
(1) The Potsdam Declaration and the surrender 45
(2) The Far Eastern Commission and the Allied Council for Japan 48
(3) Status and character of the Supreme Commander for the Allied Powers and of the Japanese Occupation 53
b. The International Military Tribunal for the Far East 58
(1) Basic war crimes policy 58
(2) Fundamental authority of the Supreme Commander to establish the Tribunal 60
(3) Establishment of the Tribunal 62
(4) Far Eastern Commission war crimes policy decision and confirmation of the Supreme Commander's authority 63
(5) Petitioners' trial before the International Military Tribunal 67
(6) Summary and Conclusion 69
B. National courts cannot review the judgment or sentences of the International Military Tribunal for the Far East, or any action taken to carry out its judgment or sentences 70
IV. The President, as Commander in Chief, and in the conduct of foreign affairs, had power under the Constitution to join with the Allied nations in establishing the International Military Tribunal for the Far East 81
V. Even assuming that the President was without power to join with other nations in the establishment of the International Military Tribunal for the Far East, the fact remains that it was established by 10 other nations and that General MacArthur, as Supreme Commander, may act as their agent in establishing the Tribunal and in carrying out its judgments 98

Page

Conclusion 105
Appendix A. Constitutional provisions and statutes involved 106
Appendix B. Letter from the Acting Secretary of State 116

CITATIONS

Ableman v. Booth, 21 How. 506 76
Ahrens v. Clark, 335 U. S. 188 ..... 7, 29, 30
Alicia, The, 7 Wall. 571 29
Amiable Isabella, The, 6 Wheat. 1 74
American Banana Co. v. United Fruit Co., 213 U. S. 347 72
Barry, Ex parte, 2 How. 65 ..... 25, 26, 30
Bernstein v. Van Freres Societe Anonyme, 163 F. 2d 246, certiorari denied, 332 U. S. 772 72
Bollman, Ex parte, 4 Cranch 75 26
Booth, In re, 3 Wis. 157 76
Calder v. Bull, 3 Dallas 386 95
Charlton v. Kelly, 229 U. S. 447 ..... 42, 75
Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp., 333 U. S. 103 75
Claflin v. Houseman, 93 U. S. 130 80
Coleman v. Miller, 307 U. S. 433 75
Covell v. Haymore, 111 U. S. 176 80
Cross v. Harrison, 16 How. 164 84
Dooley v. United States, 182 U. S. 222 57
Duncan v. Kahanamoku, 327 U. S. 304 28
Factor v. Laubenheimer, 290 U. S. 276 43
Foster v. Neilson, 2 Pet. 253 ..... 42, 74
Frelinghuysen v. Key, 110 U. S. 63 ..... 75, 76
Gates v. Goodloe, 101 U. S. 612 84
Georgia v. Stanton, 6 Wall. 50 86
Grapeshot, The, 9 Wall. 129 84
Guaranty Trust Co. v. United States, 304 U. S. 126 42
Hamilton v. Dillin, 21 Wall. 73 84
Homma v. Patterson, 327 U. S. 759 71
Hung Hang, Ex parte, 108 U. S. 552 ..... 6, 25, 26
Jackson, In the Matter of, 15 Mich. 417 33
Jones v. United States, 137 U. S. 202 ..... 10, 42
La Abra Silver Mining Co. v. United States, 175 U. S. 423 ..... 75, 76
Lange, Ex parte, 18 Wall. 163 ..... 25, 26
Leitensdorfer v. Webb, 20 How. 176 ..... 18, 84
Luther v. Jones Sagor & Co. [1921], 3 K. B. 532 72
MacLeod v. United States, 229 U. S. 416 57
Marbury v. Madison, 1 Cranch 137 24
McNally v. Hill, 293 U. S. 131 33
Mechanics' & Traders Bank v. Union Bank, 22 Wall. 276 84
Metzger, In the Matter of, 5 How. 175 27
Mississippi v. Johnson, 4 Wall. 475 86

	Page
Neagle, In re, 135 U. S. 1	32, 33
Neely v. *Henkel*, 180 U. S. 109	38
New Orleans v. *Steamship Co.*, 20 Wall. 387	57, 83
Oetjen v. *Central Leather Co.*, 246 U. S. 297	42, 72, 74
Pearcy v. *Stranahan*, 205 U. S. 257	42
Peru, Ex parte, 318 U. S. 578	10, 25, 41, 42, 43, 75
Quirin, Ex parte, 317 U. S. 1	18, 28, 85, 93
Republic of Mexico v. *Hoffman*, 324 U. S. 30	10, 41, 42
Ricaud v. *American Metal Co.*, 246 U. S. 304	72
Robb v. *Connolly*, 111 U. S. 624	80
Ross v. *Oregon*, 227 U. S. 150	97
Siebold, Ex parte, 100 U. S. 371	6, 25, 26
Stewart v. *Kahn*, 11 Wall. 493	85
Sullivan v. *Kidd*, 254 U. S. 433	43
Tarble's Case, 13 Wall. 397	79
Terlinden v. *Ames*, 184 U. S. 270	75
Tucker v. *Alexandroff*, 183 U. S. 424	89
Underhill v. *Hernandez*, 65 Fed. 577	32
Underhill v. *Hernandez*, 168 U. S. 250	72
United States v. *Belmont*, 301 U. S. 324	10, 42, 72
United States v. *Curtiss-Wright Corp.*, 299 U. S. 304	20, 41, 75, 91
United States, Ex parte, 287 U. S. 241	29
United States v. *Lee*, 106 U. S. 196	41, 44
United States v. *Pink*, 315 U. S. 203	42, 72, 75
United States v. *Reynes*, 9 How. 127	42
United States ex rel. Boynton v. *Blaine*, 139 U. S. 306	74, 76
Vallandigham, Ex parte, 1 Wall. 243	6, 28
Vermilya-Brown v. *Connell*, dec. Dec. 6, 1948, No. 22	89
Virginia, Ex parte, 100 U. S. 339	25, 26, 27, 29
Vidal, In re, 179 U. S. 126	27
Williams v. *Suffolk Ins. Co.*, 13 Pet. 415	42, 44, 74
Woods v. *Miller*, 333 U. S. 138	85
Yamashita, In re, 327 U. S. 1	6, 18, 20, 28, 39, 46, 71, 85, 93
Yerger, Ex parte, 8 Wall. 85	25, 26
Z. & F. Assets Realization Corp. v. *Hull*, 311 U. S. 470, affirming 114 F. 2d 464	75, 76

Statutes:

Act of July 20, 1942, 56 Stat. 662, 10 U. S. C. 1423a	102
Act of August 29, 1842, 5 Stat. 539, 28 U. S. C. 2241 (c) (4)	32
Habeas Corpus Act of 1679	33
Conc. Res. 39 (House), 79th Cong., 1st sess.	94
Conc. Res. (Senate) March 18, 1943, 57 Stat. 721	59
United States Constitution:	
Art. I:	
Sec. 8	4, 17, 82, 92
Sec. 9	4, 18, 20, 21, 23, 82, 95, 100, 101

Statutes—Continued

	Page
United States Constitution—Continued	
Art. II, Sec. 2	82
Art. III, Sec. 2	5, 6, 24
28 U. S. C. 2241 (c) (4)	31, 33
28 U. S. C. 2242	31
Miscellaneous:	
Allied Control Council Law No. 10, Dec. 20, 1945	59
Articles of Confederation, Art. VI	101
Bases-destroyer Agreement with Great Britain, 1940	89
Cairo Declaration of December 1, 1943	59
Canadian-American Defense Agreement of 1940	89
Constitutional Convention of 1787, Debates, August 23, 1787	102
Department of State Bulletin No. 61	89
Department of State, Publication 2671, Far Eastern Series 17 ("Occupation of Japan")	48, 49, 54, 62
Department of State, Publication 2888, Far Eastern Series 24 ("Activities of the Far Eastern Commission"), pp. 49, 51	55
Far Eastern Commission—Policy in Regard to the Apprehension and Punishment of War Criminals in the Far East	63, 104
Far Eastern Commission—Basic Post-Surrender Policy for Japan (June 19, 1947)	54
Far Eastern Commission—Preamble to the Basic Post-Surrender Policy for Japan (June 19, 1947)	53
Far Eastern Commission, Terms of the Reference:	
Art. II-A-2	36
Art. III, sec. 1	36
Art. III-2	52
Art. V-2	50
The Federalist, No. 42	20, 92
General Assembly Resolution 95 (I) of December 11, 1946	74
1 Hackworth, *Digest of International Law* (1940)	57
Holdsworth, *History of English Law*, v. 9, p. 116	33
3 Hyde, *International Law* (2d rev. ed.) p. 1879	57
Instrument of Surrender dated September 2, 1945	37, 46, 47, 60, 62
International Mil. Tribunal, Charter for the Far East:	
Art. 3	99
Art. 8 (a)	100
Art. 17	100
Jaffe, Judicial Aspect of Foreign Relations (1933) 71	43
Kelsen, The Legal Status of Germany According to the Declaration of Berlin (1945) 39 Am. J. Int. Law 518	57

Miscellaneous—Continued

	Page
Kelsen, The International Legal Status of Germany To Be Established Immediately upon Termination of the War (1944) 38 Am. J. Int. Law 689	58
London Agreement and Charter of the International Military Tribunal of Aug. 8, 1945 (13 Dept. of State Bull. 222–226)	59
39 Op. Atty. Gen. 484	89
1 Oppenheim, *International Law* (7th ed., Lauterpacht ed. 1948) sec. 171, p. 409	57
5 Moore, *A Digest of International Law*, p. 214	88
7 Moore, Digest of International Law (1906), sec. 1143 ("Occupied Territory and its Administration")	57
Moscow Agreement of December 1945	48, 51, 56
Potsdam Declaration of July 26, 1945	48, 60
Rush-Bagot Agreement of 1817	88
9 State Department Bull., No. 214, p. 62 (July 31, 1943)	59
Treaty of Peace with Bulgaria, Art. 5	59
Treaty of Peace with Finland, Art. 9	59
Treaty of Peace with Hungary, Art. 6	59
Treaty of Peace with Italy, Part 3, Art. 45	59
Treaty of Peace with Rumania, Art. 6	59
Tripartite Declaration of Moscow on German Atrocities in 1943 (9 Dept. of State Bull. 310)	59
United States Initial Post Surrender Policy for Japan, approved by the President in September 1945	54, 62
United States Policy in Regard to the Apprehension and Punishment of War Criminals in the Far East, Par. 5	63
Van Doren, *The Great Rehearsal*	76
Way & Gideon, Journals of the American Congress, 1774–1788 (1823, p. 83)	101
Winthrop, *Military Law and Precedents* (1920)	84

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ON MOTIONS FOR LEAVE TO FILE PETITIONS FOR WRITS OF HABEAS CORPUS

BRIEF IN OPPOSITION TO MOTIONS

STATEMENT

There have been filed with this Court ~~three~~ four motions for leave to file petitions for writs of

habeas corpus on behalf of ~~seven~~ eleven enemy aliens. The petitioners are being held in custody pursuant to the judgment of the International Military Tribunal for the Far East. All of the petitioners are citizens of Japan, and all were high officials of the Japanese government or high officers of the Japanese armed forces during or preceding the recent hostilities between Japan and the allied powers.

The official capacities of the respondents (who are also sued individually) are as follows: General of the Army Douglas MacArthur is United States Commander in Chief, Far East Command, and is Supreme Commander for the Allied Powers, with headquarters in Tokyo, Japan; Lieutenant General Walton H. Walker is Commanding General of the United States Eighth Army in Japan, which is a part of the Allied occupation army, with headquarters in Tokyo, Japan; General Omar H. Bradley is Chief of Staff of the United States Army;[1] Kenneth C. Royall is Secretary of the Department of the Army; James V. Forrestal is Secretary of Defense.

At various times after the Japanese surrender on September 2, 1945, the petitioners were taken

NOTE.—This brief is accompanied by a Documentary Appendix, separately bound, containing most of the official documents referred to in the following discussion.

[1] General Bradley is named as respondent in two of the four petitions accompanying the motions; he is not named as respondent in the other two.

into custody by the Allied forces. On November 12, 1948, and after an extended trial, the petitioners were found guilty by the International Military Tribunal for the Far East of various war crimes. The charges upon which the petitioners were convicted were of three general types: (1) crimes against peace, (2) conventional war crimes, and (3) crimes against humanity, including murder. Petitioners Hirota, Dohihara, Kimura and Muto were sentenced to death; petitioners Kido, Oka, Sato, Shimada, and Umezu were sentenced to life imprisonment; petitioner Togo was sentenced to 20 years' imprisonment, and petitioner Shigemitsu to seven years' imprisonment.[2]

Each of the petitioners is presently confined in Sugamo Prison, in Tokyo, Japan. The petitioners are in the custody of respondent Lieutenant General Walton H. Walker, Commanding General of the United States Eighth Army, who holds the petitioners pursuant to the orders of General

[2] The former official positions of the petitioners may be summarized briefly as follows: Hirota, Foreign Minister and Prime Minister of Japan; Shigemitsu, Foreign Minister; Kido, cabinet member and Lord Keeper of the Privy Seal; Togo, Foreign Minister; Dohihara, Sato, Kimura, Muto, and Umezu, high officers in the Japanese Army; Shimada, Navy Minister; Oka, a high officer in the Japanese Navy. The various positions held by the petitioners are set forth in detail in Appendix E of the indictment on which petitioners were tried before the International Military Tribunal for the Far East.

Douglas MacArthur as Supreme Commander for the Allied Powers. General Walker has been directed by the Supreme Commander to carry out the sentences imposed upon petitioners by the Tribunal, and is ready to do so.

Although the petitioners do not all make the same contentions, their principal challenges to the convictions based on American law are: (1) that since the United States Constitution, Art. I, Sec. 8, empowers Congress to define and punish offenses against the law of nations, the executive branch of the Government is without power to enter into an agreement with other nations defining such offenses and authorizing the establishment of the International Military Tribunal for the Far East for the trial and punishment of such offenses; (2) that the executive branch of the Government is without power to enter into an international agreement to punish petitioners for offenses which, if defined by Congress, would violate the *ex post facto* clause of the Constitution, Art. I, Sec. 9; (3) that General MacArthur is prohibited from acting as Supreme Commander of the Allied Powers in establishing the Tribunal pursuant to the international agreement and in executing its judgments, by the provision of the Constitution, Art. I, Sec. 9, that no officer of the United States "shall, without the consent of the Congress, accept of any * * * office, or title, of any kind whatever, from any * * * foreign state."

The petitioners also raise certain issues based upon international law.

It is the government's position that this Court has no jurisdiction to issue a writ of habeas corpus or to review the judgments of the International Military Tribunal for the Far East, and hence that neither the issues based upon American law nor those based upon international law should be considered. We deal in this brief only with the contentions made by petitioners under American law since their contentions under international law would manifestly be relevant only if this Court should determine that it has jurisdiction to review the proceedings of an international tribunal.

On December 6, 1948, this Court announced that "it desires to hear argument upon the questions presented by the motions for leave to file petitions for writs of habeas corpus." *

SUMMARY OF ARGUMENT

I

A. Since this cause is not one within the original jurisdiction of this Court as defined in Article III, Sec. 2, Cl. 2, of the Constitution, this Court has power to issue an original writ of habeas

* The order refers to the motions and accompanying petitions in Nos. 239, 240, and 248, Misc. The fourth petition was filed in No. 267, Misc., after the order of December 6th, and the Court has not yet acted upon the motion in that case.

corpus only in aid of its appellate jurisdiction. *Ex parte Siebold*, 100 U. S. 371, 374–375.

B. The appellate jurisdiction which this Court may exercise must relate to an exercise of the judicial power under Article III, Sec. 2, cl. 1, of the Constitution. *Ex parte Hung Hang*, 108 U. S. 552. Since even American military commissions do not represent an exercise of judicial power under Article III of the Constitution (*Ex parte Vallandigham*, 1 Wall. 243), *a fortiori*, an international tribunal, exercising the military power, not of the United States alone, but of nations who together waged war, does not exercise judicial power under the American Constitution. This Court, therefore, has no appellate supervisory jurisdiction over such a tribunal.

C. Assuming that this Court could exercise appellate jurisdiction, if the action could properly have been brought in some district court of the United States, no such appellate jurisdiction exists since no district court of the United States has jurisdiction to entertain an application by these petitioners. The only power which the courts of the United States have to review judgments of military commissions is the power to grant writs of habeas corpus to inquire into the cause of restraint of liberty. *In re Yamashita*, 327 U. S. 1, 8. No district court of the United States would have jurisdiction to issue a writ of habeas corpus on the relation of these peti-

tioners since petitioners are not detained within the territorial jurisdiction of any district court, and there is not within the reach of the process of a United States Court any respondent having effective custody and control of the petitioners.

1. In *Ahrens* v. *Clark*, 335 U. S. 188, holding that ordinarily a federal district court is without jurisdiction to issue a writ of habeas corpus when the person on whose behalf the writ is sought is not detained within the territorial jurisdiction of the court; this Court left open the question of what process a person confined in an area not subject to the jurisdiction of a district court may invoke to assert federal rights. However, the reasoning by which this Court reached its conclusion in the *Ahrens* case indicates that there is a total absence of power to issue the writ where there is no detention within the district. That conclusion is reinforced by the revision of the habeas corpus statute in Title 28 of the United States Code and by the common law of habeas corpus.

2. Whether or not the power of the district court to issue a writ of habeas corpus depends on the place of detention, it is clear that, if the relator is detained outside the jurisdiction, there must at least be within the jurisdiction of the court a person who has such control and custody of the person detained that he has power to order the release of the person held. There is no such

person within the jurisdiction of any district court of the United States.

The chain of authority under which petitioners are held runs as follows: The Far Eastern Commission, comprised of eleven nations, makes policy decisions with respect to the occupation and control of Japan, and has made a policy decision on war crimes. Its decisions are transmitted by the United States Government through the channels of the American Joint Chiefs of Staff to the Supreme Commander for the Allied Powers who carries out those commands as Executive Authority for the Allied Powers. In that chain of authority, the only persons presently within the reach of the process of any district court of the United States are the Joint Chiefs of Staff. They, however, merely act as a conduit to transmit the policies of the Far Eastern Commission to the executive officer. The United States has no power to deviate from the policy decisions of the Commission. An order by the Joint Chiefs of Staff contrary to a policy decision would, therefore, not be binding on the Commission or the Supreme Commander as the executive authority for the Allied Powers. Hence, neither the persons having immediate custody nor the persons having ultimate and effective control of petitioners are within the jurisdiction of a court of the United States.

II

Petitioners are not governed by and have no standing to assert rights under the Constitution and laws of the United States. They are citizens and residents in Japan, a country which forms no part of the United States or its possessions. That country has been conquered, not by the United States alone, but by a group of allied nations. That country surrendered, not to the United States alone, but to the four major allied powers, and it is presently governed, not by the United States alone, but by allied powers. Petitioners are thus foreigners in a foreign land, held in that foreign land by the sovereignty presently governing that foreign land. The Constitution and laws of the United States, therefore, cannot apply to them.

Whether the persons acting for the United States as part of the allied powers who together make up the government of Japan are properly so acting under the United States Constitution, is not a matter which concerns petitioners. Before they can challenge the right of anyone to act under the Constitution or laws of the United States, they must show that they have rights under the Constitution and laws of the United States. Since the petitioners can make no such showing, they have no standing to come into a United

States Court under any statute of the United States.

III

A. Since petitioners are held pursuant to the judgment of an international tribunal by the executive authority for the allied powers, the judgment under which they are being held, and the action of that executive officer are not subject to review by this Court or by any national court.

1. The international character of the International Military Tribunal for the Far East is certified to by a letter from the Acting Secretary of State. We submit that this certification must be accepted by this Court as a conclusive determination of the character of the tribunal whose judgment petitioners attack.

This Court has always insisted that American courts should so act as not to embarrass the executive arm in its conduct of foreign affairs. *Republic of Mexico* v. *Hoffman*, 324 U. S. 30. It has accepted without question presidential recognition of a foreign government (*United States* v. *Belmont*, 301 U. S. 324, 330), executive decision as to which nation is sovereign over a particular place (*Jones* v. *United States*, 137 U. S. 202, 212), a certification by the State Department that a foreign vessel is state-owned and immune from seizure (*Ex parte Peru*, 318 U. S. 578, 590). Far more significant is the executive department's present certification that the tribunal whose judg-

ment is here questioned is a truly international court. The present occupation of Japan involves many complex strands in our present relations with the world community, and serious harm may follow a holding that the military tribunal is not the international enterprise participating countries have taken it to be.

2. If this Court chooses to examine the nature and status of the international military tribunal, its conclusion must necessarily accord with that of the State Department. The trial by which petitioners were convicted was a wholly international undertaking.

a. In the Potsdam Declaration of July 26, 1945, subsequently adhered to by the Soviet Union, the United States, Great Britain and China proclaimed the terms of surrender for Japan and announced that points in Japanese territory would be occupied by the allied powers. (Documentary Appendix, pp. 1-3.) Japan surrendered to the governments of the United States, United Kingdom, U. S. S. R. and China. The Instrument of Surrender was signed by the Supreme Commander for the Allied Powers on behalf of those four nations, and was also signed by representatives of the nine powers at war with Japan. (Documentary Appendix, pp. 11–12.)

The position of the Supreme Commander with relation to the allied powers was clarified by the Moscow agreement of December 1945, acceded to

by the foreign ministers of the United Kingdom, U. S. S. R., and the United States, with the concurrence of China in the Far Eastern provisions. By this agreement the Supreme Commander became the "sole executive authority for the Allied Powers in Japan." (Documentary Appendix, pp. 14–20.)

There was also established a Far Eastern Commission composed of representatives of the nine nations signatory to the instrument of surrender, plus India and the Philippine Commonwealth. The Commission's functions were described in its Terms of Reference to be (1) formulation of policies by which Japan could fulfill its obligations under the terms of surrender; (2) the review of any directive issued to or any action taken by the Supreme Commander involving policy decisions within the jurisdiction of the Commission; (3) consideration of such matters as might be assigned to it by agreement among the participating governments. The Commission's policy decisions are transmitted to the United States Government, and that Government prepares directives in accordance with these decisions and transmits them to the Supreme Commander. The United States may issue interim directives pending action by the Commission, provided that any directives dealing with fundamental changes in the regime of control will be issued only following consultation and agreement in the Far Eastern Commission. (Documentary Appendix, pp. 15–17.)

The Supreme Commander for the Allied Powers thus acts for the allied powers in concert. The allied character of the occupation has been constantly recognized and reaffirmed by the United States Government, the Allied Powers, and the Far Eastern Commission. Supreme dominion over Japan is held, not by the United States or by any single nation, but internationally and jointly by a group of powers.

b. The apprehension, trial and punishment of war criminals has been a major war aim and is part of the basic post-surrender policy of all the nations participating in a war against the axis. For Japan the war crimes policy was first suggested in the Cairo declaration of December 1, 1943, issued by the Presidents of the United States, China and the Prime Minister of the United Kingdom. This policy was formally stated in the Potsdam declaration announcing as one of the terms of surrender "that stern justice shall be meted out to war criminals."

In October 1945, before the Far Eastern Commission was established by the Moscow agreement, the United States Government approved a directive embodying the policy of the United States in regard to the apprehension and punishment of war criminals in the Far East. This policy expressly envisaged the creation by the Supreme Commander, with the participation of other nations, of special international military

courts to be appointed under international authority. This directive was transmitted to the other allied powers with the suggestion that they participate in the proposed international tribunal. After consultation with the nine nations which signed the instruments of surrender, the Supreme Commander on January 19, 1946, proclaimed the establishment of the International Military Tribunal for the Far East. This was after the Moscow agreement establishing the Far Eastern Commission, but before the Commission actively functioned as such.

After the Commission began to function, it adopted a policy decision on war criminals, dated April 3, 1946. This policy decision defined the nature of war crimes substantially in accordance with the Nuremberg charter. It provided that the Supreme Commander shall have power to appoint special international military courts for the trial of the Far Eastern war criminals and, subject to consultation, power to prescribe rules of procedure for such courts. The policy decision expressly stated that "in the appointment of the international courts and in all trials before them the international character of the courts and the authority by which they were appointed and under which they act should be properly emphasized and recognized, particularly in dealings with the Japanese people." The decision further gave the Supreme Commander for the Allied

Powers responsibility for carrying out the judgments of any international courts and the power to modify sentences after consultation with representatives of the interested nations.

A directive based on the Commission's war crimes policy decision was transmitted to the Supreme Commander through the Joint Chiefs of Staff. On April 26, 1946, the Supreme Commander superseded the original charter and promulgated the charter under which petitioners were tried. The tribunal consisted of 11 members, representing each of the countries making up the Far Eastern Commission. Petitioners were tried under an indictment brought in the name of the 11 powers, signed by the Chief of Counsel acting on behalf of the United States and by associate counsel each acting on behalf of one of the other participating nations. The tribunal's judgment was delivered in November 1948, and was transmitted directly to the Supreme Commander as the charter required. After consultation with the other interested nations, in accordance with the Far Eastern Commission's war crimes policy decision, the Supreme Commander approved the sentences and ordered that they be carried out.

These facts conclusively establish that the International Military Tribunal for the Far East is a truly international tribunal.

B. Since petitioners are held under the judgment of an international tribunal, no national court can review the judgment or any action taken to carry out the judgment. The international tribunal was not established under American law or pursuant to American authority, but draws its life wholly from international agreements and cooperative undertakings. Its source of power and authority is independent of the domestic law of the 11 participating states, and the sovereign which created it is separate and distinct from any of these nations. Under traditional principles our courts will not undertake to pass upon the validity under the municipal law of another state of the acts of the officials of that state purporting to act as such. Still less should our courts undertake to pass upon the validity of the proceedings before an international court trying enemy aliens in enemy territories under international control.

Moreover, our courts have no power under the Constitution to decide political questions directly involving the foreign relations of the United States. A controversy over the jurisdiction and proceedings of an international court for the trial of enemy war criminals manifestly presents such political questions.

Once it is suggested that the American courts may undertake to review the judgments of an international court or pass upon the action of the

agents of an international authority, most unhappy consequences can be anticipated in the development of international affairs. Other nations cannot be expected to agree to the establishment of international courts if our domestic courts are free to review their holdings on habeas corpus or otherwise. If American courts have this freedom, there is nothing to gainsay similar competence in the courts of other nations. Peaceful and judicial settlement of international disputes as well as continued growth of world law is bound to be hampered. Other cooperative endeavors in which Americans are employed as agents of international bodies, such as United Nations activities will also suffer. We do not hesitate to declare the Government's deep concern at any such threat to our power to engage in international activities.

IV

Petitioners challenge the President's power to enter into an international agreement by which the international military tribunal was established on the ground that (1) the President possesses no power to enter into an agreement to define and punish offenses under the law of nations because Article I, section 8, of the Constitution fixes that power exclusively in Congress, (2) the definition of crimes against the peace in the charter of the International Military Tri-

bunal violates the command of Article I, section 9, of the Constitution that no *ex post facto* law shall be passed. It is the Government's position that the President's action was well within his powers as Commander-in-Chief and as the organ of this Government in the conduct of its foreign relations.

Under the Constitution the power of the President as Commander-in-Chief includes the power to exercise military government over conquered enemy country. In such government, the President represents the whole sovereignty of the Nation. Specifically, it has been repeatedly held that the President and the military commanders may establish courts not provided for by the Articles of War and confer upon those courts civil and criminal jurisdiction. *Leitensdorfer* v. *Webb*, 20 How. 176, 178. Still more specifically, "An important incident to the conduct of war is the adoption of measures by the military command not only to repel and defeat the enemy, but to seize and subject to disciplinary measures those enemies who in their attempt to thwart or impede our military effort have violated the law of war." *Ex parte Quirin*, 317 U. S. 1, 28; *In re Yamashita*, 327 U. S. 1, 11.

Under our Constitution the President, as Commander-in-Chief, is solely responsible for the taking of all steps necessary to maintain and protect our military occupation. These are great

powers but they are inherent in the responsibilities which the Constitution imposes on the President as Commander-in-Chief. It is neither trite nor meaningless to say that the President's responsibility for his exercise of these great powers is entirely political. Determinations must be made in the light of facts which are within the peculiar knowledge of the President and the military commanders: the temper of the people, the past roles of enemy leaders, the disposition of American forces and our relationships to other nations.

Moreover, in an allied war, waged not by the United States alone, but by the United States in conjunction with other powers, the President must also exercise the great power which he has as the organ of the United States in the conduct of foreign relations. Even in times of peace, the President has power to enter into agreements with other nations in matters concerning the defense of the United States. In wartime, and particularly in the waging of coalition war as in World War II, the occasion and necessity for such agreements between military allies is self-evident.

In view of the circumstances under which Japan was conquered and occupied by the joint allied powers and in view of the great authority which is entrusted to the President under our Constitution both as Commander-in-Chief and as the organ of the United States in foreign rela-

tions, we think it is clear that the President had power to enter into an agreement with our Allies unlimited by the restrictions of American domestic law. In its dealings in the international field, the right and power of the United States "are equal to the right and power of the other nations of the international family. Otherwise, the United States is not completely sovereign." *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304, 318.

Whatever might be the limit of the President's power, if Congress had ever purported exhaustively to define offenses against the law of nations, the fact remains that Congress has never done so. The purpose of Article I, Sec. 9 of the Constitution was to vest in the Federal Government, to the exclusion of the states, the power to define offenses against the law of nations as an element of the exclusive control of foreign relations to be vested in the Federal Government. Madison, in the *Federalist*, No. 42. Congress has left the definition of the offenses which might be tried by American military commissions "to the rules and precepts of the laws of nations," and this Court has recognized that such offenses may be defined in treaties. *In re Yamashita*, 327 U. S. 1, 7–8. A formal treaty, however, is not the only method by which this Government may join with other nations in defining and prescribing punishments for offenses against the laws of

nations arising out of a war. The President, both as Commander-in-Chief and as the organ of the Federal government in foreign relations, must have power to represent the United States in reaching an agreement with our military allies as to what must be done to carry out the policy of this nation and the policies of other participating nations to punish war criminals. Since the punishment of war criminals is part of the conflict, the power to wage war collectively must include the power to try war criminals collectively.

These same considerations compel the conclusion that the President, in entering into agreements with other governments for the punishment of war crimes, is not restricted by such limitations of our domestic law as the provision in Article I, Section 9, of the Constitution that no *ex post facto* law shall be passed. An international agreement inherently involves a compromise of the legal policies of the participating nations. To conclude that domestic legal policies of the United States must govern the content of any such agreement to which the United States is a party would create intolerable uncertainty as to whether our concurrence was effective. If each of the other nations should take the same position, that there are domestic limitations applying to international agreements, it would probably be impossible for nations to act jointly in the development of international order. The

agreement for the definition and punishment of war crimes is a political and military decision to which the *ex post facto* clause of the Constitution has no more application than it does to the retrospective operation of judicial decisions.

Actually, the question presented is not whether the general principle against retroactive criminal legislation should be applicable to the definition and punishment of war crimes. Petitioners' real contention is that this nation may not participate in an international agreement defining and punishing war crimes except upon the condition that our rule against *ex post facto* criminal legislation be applied in exactly the same way as our courts would apply it to acts of Congress under the same circumstances. Fundamental justice does not require all the gloss that has been attached to the interpretation of the *ex post facto* provision of our Constitution. If the United States is to participate with other nations in the development of international law generally, it must be on the basis of compromise, and on the assumption that the representatives of other legal systems are as zealous as ours in seeking to administer fundamental justice.

V

Whatever the powers of the United States to enter into an international tribunal, the fact remains that the tribunal has acted, and that Gen-

eral MacArthur, as Supreme Commander for the Allied Powers, now proposes to carry out its sentences. No American court has jurisdiction to question the validity of the policy decision of the Far Eastern Commission after subtracting therefrom the participation of the United States or to determine the effect of alleged illegal American participation.

Petitioners attack the authority of General MacArthur to act for the nations other than the United States on the ground that by so doing he would accept a title and place of trust from foreign governments, without consent of Congress, in violation of Article I, Section 9, of the Constitution. In effect, they are arguing that that clause prohibits an American officer from exercising the supreme command of the armed forces of nations joined with us in war against a common enemy.

The contention is made too late in American history. The Nation was born of a military coalition of the original colonies. It is incredible that the men who recognized the necessity of unified command at the outset of the Revolution intended by this clause to prevent any American from exercising unified command over the troops of the United States and other nations allied with it. If the United States has power to wage war, it must have the power to join with allies in successfully prosecuting that war. Where war requires

a unified command, an American officer may exercise command over the troops of other nations, and in so doing, he must faithfully execute the allied decision without regard to his own national law.

ARGUMENT

I

THIS COURT IS WITHOUT POWER TO ISSUE AN ORIGINAL WRIT OF HABEAS CORPUS SINCE IT HAS NEITHER ORIGINAL NOR APPELLATE JURISDICTION IN THIS CAUSE

A. THIS CASE IS NOT WITHIN THE ORIGINAL JURISDICTION OF THIS COURT

Article III, section 2, clause 2 of the Constitution of the United States provides:

> In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The case of *Marbury v. Madison*, 1 Cranch 137, 175, firmly established that Congress has no power to confer on this Court original jurisdiction in cases other than those described

in the Constitution. This Court recently reaffirmed that doctrine in *Ex parte Peru*, 318 U. S. 578, 582, 583, footnote 3. Specifically, with relation to its statutory authority to issue writs of habeas corpus, this Court has frequently and consistently ruled that, except where the case is one within its original jurisdiction, it has power to issue such writs only in aid of its appellate jurisdiction. *Ex parte Barry*, 2 How. 65; *Ex parte Yerger*, 8 Wall. 85, 97–98; *Ex parte Lange*, 18 Wall. 163, 166; *Ex parte Siebold*, 100 U. S. 371, 374–375; *Ex parte Virginia*, 100 U. S. 339, 342–343; *Ex parte Hung Hang*, 108 U. S. 552, 553.

This is not a case affecting an Ambassador, a public Minister, or a Consul; it is not a case in which a State is a party. Hence it is not a case within the original jurisdiction of this Court.

B. Since Military Commissions Do Not Exercise Judicial Power Under Article III, Section 2, Clause 1 of the Constitution, This Court Has No Appellate Jurisdiction To Review or Revise Decisions of an International Tribunal in the Nature of a Military Commission

In the period when Congress withheld from this Court the power of direct review in criminal cases, this Court nevertheless did review jurisdic-

tional issues in such cases by means of original writs of habeas corpus. E. g., *Ex parte Bollman*, 4 Cranch 75, 100; *Ex parte Lange*, 18 Wall. 163, 166; *Ex parte Siebold*, 100 U. S. 371, 373–374; *Ex parte Virginia*, 100 U. S. 339, 342–343. This Court held in those cases that the issuance of the writ was an exercise of its appellate jurisdiction, as it was sitting in judgment and undertaking to affirm or revise the judicial action of a lower federal court. But throughout that period, when original writs by this Court had their greatest vitality, this Court constantly emphasized that this appellate jurisdiction existed because it was sitting in review of judicial action. E. g., *Ex parte Yerger*, 8 Wall. 85, 103; *Ex parte Virginia*, 100 U. S. 339, 342–343. In the same period, this Court consistently held that appellate jurisdiction did not exist when the action which it was called upon to review was not judicial action. Thus, in *Ex parte Barry*, 2 How. 65, in holding that this Court could not entertain an original writ of habeas corpus to examine into the custody of an infant, Justice Story pointed out that there was before the Court no judicial application of any kind which the Court could review. In *Ex parte Hung Hang*, 108 U. S. 552, this Court held that an arrest under a warrant issued by a police judge represented no judicial action which could be the subject of appellate jurisdiction. *In the*

matter of Metzger, 5 How. 175, this Court went so far as to hold that the action of a judge in chambers, surrendering a person sought for extradition, was not judicial action, and hence that the judge's order could not be reviewed by means of a writ of habeas corpus issued by this Court. The holding of the case that the action of the judge was not judicial action was subsequently questioned (see *Ex parte Virginia*, 100 U. S. at page 341), but none of the later cases disputed the principle that some judicial action must have occurred before a writ of habeas corpus in aid of appellate jurisdiction could be maintained. The very care with which such cases as *Ex parte Yerger*, 8 Wall. 85, 103 (upholding the right to review an order of the district court remanding a person to the custody of military authorities) and *Ex parte Virginia*, 100 U. S. 339, 342 (upholding the power of the Court to review the issuance of a bench warrant) spell out the nature of the judicial action which they are reviewing serves merely to emphasize that the supervisory appellate jurisdiction which will support a writ of habeas corpus in this Court must relate to an exercise of the judicial power conferred by Article III, section 2 of the Constitution.

The reasoning of *Ex parte Virginia*, and the other cases cited above, thus offers no support to petitioners, for it is well settled that the power

exercised by military commissions to try offenses is not an exercise of judicial power under Article III, section 2 of the Constitution. This Court so ruled in *Ex parte Vallandigham,* 1 Wall. 243, 251. It reaffirmed that ruling in *In Re Vidal,* 179 U. S. 126–127. And it has recently reasserted and reaffirmed that principle in *Ex parte Quirin,* 317 U. S. 1, 39; *In Re Yamashita,* 327 U. S. 1, 8; and in *Duncan* v. *Kahanamoku,* 327 U. S. 304, 309. As this Court said in the case last cited, "it had long been established that military tribunals are not part of our judicial system."

Since, therefore, this Court does not have, in relation to military tribunals, the kind of supervisory appellate jurisdiction which it has in relation to lower judicial courts, there is, in relation to military tribunals, no appellate jurisdiction to which a writ of habeas corpus can be an aid. Furthermore, since military tribunals composed solely of Americans exercising solely American military power do not exercise judicial power under Article III of the American Constitution, *a fortiori,* an international tribunal such as we have here—composed, not of Americans alone but of representatives of 11 nations, exercising the military power, not of the United States alone, but of nations who together waged war—does not exercise judicial power under the American Constitution. This Court manifestly has no appellate supervisory jurisdiction over such a tribunal.

C. There is No Potential Jurisdiction Over This Cause in Any Court of the United States and Thus no Potential Appellate Jurisdiction in This Court

There remains to be considered the question whether, on some theory, this cause could be brought within the original jurisdiction of some court of the United States, whose ruling would then be subject to judicial review. Such an original action could be only by a writ of habeas corpus in a district court since, as this Court recently stated in *In re Yamashita*, 327 U. S. 1, 8, with respect to military tribunals,

> Congress conferred on the courts no power to review their determinations save only as it has granted judicial power "to grant writs of habeas corpus for the purpose of an inquiry into the cause of restraint of liberty."

In an ordinary cause, it would be sufficient to point out that, although this Court has gone far in recognizing potential appellate jurisdiction after the very commencement of a judicial proceeding (see *Ex Parte United States*, 287 U. S. 241; *Ex parte Virginia*, 100 U. S. 339, 342), it has, so far as we have been able to find, never gone so far as to act in aid of its appellate jurisdiction when no judicial proceeding of any kind has been commenced in a lower court. As Chief Justice Marshall said in the case of *The Alicia*,

7 Wall. 571, 573, "an appellate jurisdiction necessarily implies some judicial determination, some judgment, decree or order of an inferior tribunal, from which an appeal has been taken." At the very least, appellate jurisdiction implies some application to a court on which a judicial determination can be made. See *Ex parte Barry*, 2 How. 65. No such application exists here.

In view, however, of the extraordinary nature of this proceeding, we think that it should be made clear that no court of the United States has power to grant a writ of habeas corpus on the relation of these petitioners, or to grant them any other relief.

1. *Under the present habeas corpus statute, no district court has power to issue a writ of habeas corpus where the person on whose behalf the writ is sought is not confined within the territorial limits of the court.*

As this Court recently held in *Ahrens* v. *Clark*, 335 U. S. 188, ordinarily, a federal district court is without jurisdiction to issue a writ of habeas corpus if the person on whose behalf the writ is sought is not detained within the territorial jurisdiction of the court when the petition is filed. In that case this Court left open the question as to what process, if any, a person confined in an area not subject to the jurisdiction of any district court may employ to assert federal rights. 333

U. S. at p. 192, fn. 4. However, the reasoning by which this Court reached its conclusion in the *Ahrens* case indicates that, where there is no detention within the district, there is a total absence of power to issue the writ, rather than a mere withholding of power in the interest of orderly administration. That conclusion—that the whole scheme of the habeas corpus statute is based on the assumption that there must be custody within the territorial jurisdiction of the court—is reinforced by the recent revision of the statute in the new Title 28 of the United States Code, the provisions of which would, of course, be applicable to any possible proceedings by these petitioners. Sec. 2242 of Title 28 has added a new provision to the former habeas corpus statute to the effect that, if an application is made to this Court or to a circuit judge, "it shall state the reasons for not making application to the district court *of the district in which the applicant is held.*" [Italics supplied.] That section clearly assumes that there must be detention within the territorial jurisdiction of a district court.

Petitioners seem to assume that some extra-territorial jurisdiction is implied in that portion of the habeas corpus statute (presently 28 U. S. C. 2241 (c) (4)) which provides that the writ shall not extend to a prisoner unless "He, being a citizen of a foreign state and domiciled

therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations." However, that section, when examined in the light of its genesis, reinforces the conclusion that Congress assumed that habeas corpus jurisdiction was determined by the place of detention.

The circumstances which gave rise to the above-quoted section are described in the decision of this Court in *In re Neagle*, 135 U. S. 1, 71–72, and in *Underhill* v. *Hernandez*, 65 Fed. 577, 581–582 (C. C. A. 2). McLeod, a British subject, and a member of the colonial forces, repelling an attack upon Canada in 1841 by an American armed force, assisted in the destruction of a vessel moored on the American shore of the Niagara river, and during the course of that engagement an American citizen was killed. McLeod was indicted for murder in the state courts of New York. The British government demanded his release on the ground that his was a public act, performed under superior orders, which could only be the subject of discussion between the two governments. The federal government accepted that view, and demanded McLeod's release, but New York refused to accede to that demand. As a result, Congress passed the Act of August 29,

1842, 5 Stat. 539, presently incorporated in 28 U. S. C. 2241 (c) (4). The avowed object of the statute (see *In re Neagle,* 135 U. S. at p. 71–72) was to prevent a State from interfering with the course of foreign affairs, which were wholly within the province of the federal government. The statute clearly assumes presence within a State and thus within the jurisdiction of a federal court. The section, therefore supports, rather than negates the view that habeas corpus jurisdiction depends on the place of detention.[3]

The common law of habeas corpus, to which recourse is properly had in interpreting our habeas corpus statute (See *McNally* v. *Hill,* 293 U. S. 131, 136), furnishes some support for the view that custody within the jurisdiction of the court is necessary to support habeas corpus jurisdiction. True, the common law authorities are not very clear, as is shown by the fact that, in the leading American case on the subject, *In the Matter of Samuel W. Jackson,* 15 Mich. 417 (1867), the judges reached directly opposite conclusions on the basis of the same historical materials. But it is significant that Holdsworth, in his *History of English Law,* v. 9, p. 116, reports that, prior to the Habeas Corpus Act of 1679, it was

[3] While the point is immaterial on the issue of the jurisdiction, it should be noted that petitioners can gain no comfort from that section since they are not now held for an "act done" but are held under the judgment of an international court.

a common abuse for jailers to "move the prisoner about to evade a service of these writs, and, in the last resort, remove him out of the jurisdiction of the court." He also refers to attempts to secure legislation "to prevent the transportation of prisoners beyond the seas, or out of the jurisdiction of the English courts" with resulting defeat of habeas corpus jurisdiction. *Id.* at p. 117. It seems, therefore, to have been assumed at common law, that detention within the jurisdiction of the court was necessary to authorize the issuance of the writ.

Thus, the structure of our habeas corpus statute, its legislative history, and historical background, support the conclusion that detention within the territorial jurisdiction of a district court is a necessary condition to the issuance of a writ of habeas corpus. If changes are to be made, Congress must make them.

2. *Even if a district court's power to issue the writ depends merely on the presence within the jurisdiction of a respondent having effective control over the person detained, no American court has jurisdiction to issue the writ since there is in the United States no respondent who has effective custody and control of the petitioners.*

Whether or not the power of a district court to issue a writ of habeas corpus depends on the place of detention, it is clear that, if the relator is detained outside the jurisdiction, there must

at least be, within the jurisdiction of the district court, a person who has such effective custody and control of the person detained that he has power to order his release. Otherwise no order of a court could be effective. No person having such effective power is within the jurisdiction of any district court of the United States.

We discuss, *infra*, Point III, the international nature of the tribunal which convicted petitioners and the consequences that flow from its international character. Here we consider that factor only from the point of view of the jurisdiction of a district court to bring before it a respondent who has power to effectuate a mandate which the court might issue regarding the release of these petitioners.

As is discussed more fully below, Point III, petitioners are held under the judgments of the International Military Tribunal for the Far East, which was established pursuant to international agreement and in accordance with a policy decision of the Far Eastern Commission composed of eleven nations. The Far Eastern Commission's policy decisions are transmitted to the Supreme Commander for the Allied Powers, the executive authority for the Allied Powers, by the United States Government through the channels of the American Joint Chiefs of Staff.

In that chain of authority the only persons who are presently within the reach of the process

of any district court of the United States are the American Joint Chiefs of Staff. But, as the Terms of Reference for the Far Eastern Commission (Articles II and III), make clear, see Documentary Appendix, pp. 15–16, the Joint Chiefs of Staff, acting for the United States Government, serve merely as a conduit to transmit the policies of the Far Eastern Commission to the Supreme Commander for the Allied Powers. The United States, whether acting through the Joint Chiefs of Staff or otherwise, has no power to deviate in its directives from the policy decisions of the Commission. In fact, Article II–A–2 of the Terms of Reference gives the Commission power to review any directive issued to the Supreme Commander for the Allied Powers. Thus, wholly aside from the fact that a mandate to the Joint Chiefs of Staff to perform an act contrary to a policy decision of the Far Eastern Commission would require the United States to violate its agreement with other nations, an order from the Joint Chiefs of Staff contrary to a policy decision of the Far Eastern Commission would not be binding on the Commission or on the Supreme Commander for the Allied Powers as the executive authority for the Allied Powers in Japan. The result is that neither the persons having immediate custody, nor the persons having ultimate and effective control of petitioners are within the reach of the process of a court of the United States. Hence, there is not within the

jurisdiction of a United States Court a proper party respondent to whom a writ of habeas corpus on behalf of the petitioners could be issued.[1]

II

Petitioners Are Citizens of and Residents in a Foreign State, Which Is Governed, Not by the United States Alone, But by the Nations Who Together Conquered Japan, and, Therefore, Petitioners Have No Standing To Assert Rights Under the Constitution and Laws of the United States.

Petitioners are citizens of and residents in Japan, a country which forms no part of the United States or its possessions. That country has been conquered, not by the United States alone, but by a group of allied nations acting in concert, all of whom have disclaimed any intention of annexing Japan. That country surrendered, not to the United States alone, but to the four major allied powers (Instrument of Surrender dated September 2, 1945, Documentary Appendix, pp. 11–12). That country is presently governed, not by the United States alone, but by the Supreme Com-

[1] Among the respondents actually named by petitioners, Secretary of National Defense James V. Forrestal, and Secretary of the Army Kenneth C. Royall, are clearly improper parties since they have no place in the chain of authority outlined above. The situation is of course very different, as applied to persons tried by Court-martial under the Articles of War, for there the Secretary of the Army does have real and effective authority.

mander for the allied nations who together conquered Japan (see *infra*, pp. ~~44–56~~ 45-58).

Under the circumstances, petitioners cannot claim any rights under the Constitution or the laws of the United States. They are foreigners in a foreign land, held in that foreign land by the sovereignty presently governing that foreign land. They happen to be held by an American, but so far as petitioners are concerned, they are held, not by an American acting for the United States alone, but by an American acting for the dominant governing authority of their country—the joint Allied Powers.[5] Petitioners, therefore, are not subject to duties under the Constitution and laws of the United States, and have no rights under the Constitution and laws of the United States.

This Court has held that a country occupied by the United States alone as the result of conquest is foreign territory which "cannot be regarded in any constitutional, legal or international sense, a part of the territory of the United States." *Neely* v. *Henkel*, 180 U. S. 109, 119. It held in that case that an American citizen, who violated a law established by the military governor of Cuba, could be extradited to Cuba for trial under Cuban law as established by the military governor, although the mode of trial in Cuba did not embody the procedural guarantees of the United

[5] See *infra*, pp. 44–56, for a more detailed discussion of the nature of the present government of Japan.

States Constitution. This Court there said that such guarantees "have no relation to crimes committed without the jurisdiction of the United States against the laws of a foreign country." 180 U. S. at p. 122.

Manifestly, if foreign territory governed by the United States alone is territory outside the scope of the Constitution and laws of the United States, foreign territory occupied, not by the United States alone, but by the United States conjointly with its allies, is clearly not subject to the Constitution and laws of the United States. If the fact that the United States happens to take part in the military government of Japan makes the Constitution and laws of the United States applicable to Japanese citizens, then Japanese citizens are also subject to the Constitution and laws of Great Britain, China, and the Soviet Union. If any Japanese citizen, aggrieved by an American officer acting for the Allied Powers, can appeal to the courts of the United States for redress, he would also have the right to appeal to the courts of each of the occupying powers.

Petitioners are not governed by the Constitution and laws of the United States as such.

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[6] In this respect, the present case is very different from *In re Yamashita*, 327 U. S. 1, where a Japanese was tried on United States soil by a military Commission of the United States. There was no claim in that case that the American Constitution did not apply territorially. The question was merely whether Yamashita, as an enemy alien prisoner of war, could avail himself of rights under the Constitution.

They are governed by and subject to the laws of their own country, which in terms of ultimate power is controlled by a concert of nations, including the United States. Whether the person acting for the United States is properly so acting under the United States Constitution is not a matter which petitioners have standing to challenge. Before they can attack the right of anyone to act under the Constitution and laws of the United States, they must show that they have rights under the Constitution and laws of the United States. Since petitioners have no such rights, they have no standing to come into any United States court under any statute of the United States.

III

Petitioners Are Being Held Pursuant to the Judgment of an International Tribunal the Judgments of Which Are Not Subject to Review on Any Ground by This Court or by Any National Court

A. The International Military Tribunal for the Far East Is an Interntional Court Acting Under International Agreement.

1. *The Department of State's certification should be accepted*

a. There is appended to this brief a letter from the Acting Secretary of State certifying that the International Military Tribunal for the Far East

is not an American court or commission but an international court, acting under international agreement. We urge that this certification be accepted by the Court as a conclusive determination of the character of the Tribunal whose judgment petitioners attack. The establishment, by the United States together with other nations, of an international forum for the trial of war crimes, the settlement of claims, or the determination of other matters common to the participating states, is an increasingly important implement in the conduct of foreign relations. It would be a most serious interference with the proper course of our external affairs for courts of the United States, in the absence of specific Congressional directive, to decide for themselves that a given tribunal was domestic or international, where the department of the government charged with the carrying on of our foreign relations discloses that in our intercourse with other interested nations this country has agreed upon the international status of the particular forum.

For reasons well grounded in the distribution of functions in our Government (*United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304, 319–21), this Court has always insisted that American courts "should not so act as to embarrass the executive arm in its conduct of foreign affairs." *Republic of Mexico* v. *Hoffman*, 324 U. S. 30, 35; *United States* v. *Lee*, 106 U. S. 196, 209; *Ex*

parte Peru, 318 U. S. 578, 588. The government recognized by the President as representative of a foreign sovereign state will be accepted without question (*Oetjen* v. *Central Leather Co.*, 246 U. S. 297; *United States* v. *Belmont*, 301 U. S. 324, 330; *Guaranty Trust Co.* v. *United States*, 304 U. S. 126, 137–8), as will the "underlying policy" which governs the question of recognition by the United States (*United States* v. *Pink*, 315 U. S. 203, 229). Decision as to the nation which is sovereign over a particular piece of territory is also left to the executive. *Jones* v. *United States*, 137 U. S. 202, 212; *Foster* v. *Neilson*, 2 Pet. 253, 307–9; *Pearcy* v. *Stranahan*, 205 U. S. 257, 265. A certification by the State Department that a foreign vessel, sued in our courts, is state-owned and immune from seizure automatically leads to a dismissal of the action, whatever view of the vessel's immunity the Court would have itself taken. *Ex parte Peru*, 318 U. S. at 588–590; *Republic of Mexico* v. *Hoffman*, 324 U. S. 30, 34–6. Even treaties from which private rights flow will normally not be interpreted contrary to a definite position taken by the executive *vis à vis* a foreign country, especially where judicial intervention might well cause difficulties in the larger sphere of foreign relations. *Foster* v. *Neilson*, 2 Pet. 253, 307–9; *Williams* v. *Suffolk Ins. Co.*, 13 Pet. 415; *United States* v. *Reynes*, 9 How. 127, 153–155; *Charlton* v. *Kelly*, 229 U. S. 447, 468,

474–6; *Sullivan* v. *Kidd*, 254 U. S. 433, 442; *Factor* v. *Laubenheimer*, 290 U. S. 276, 295; cf. Jaffe, *Judicial Aspect of Foreign Relations* (1933), 71–78.

These are all applications of a general principle of judicial abstention from the domain of foreign affairs which, we believe, likewise requires the Court to accept, without further inquiry, the official statement on behalf of the executive, that the International Military Tribunal for the Far East is a true international court constituted under an international agreement. If the "judicial seizure of the vessel of a friendly foreign state is so serious a challenge to its dignity, and may so affect our relations with it, that courts are required to accept and follow the executive determination that the vessel is immune" (*Ex parte Peru*, 318 U. S. 578, 588), certainly the far-greater seriousness of the present challenge, and the grave consequences of an assumption of jurisdiction, compel judicial acceptance of the political department's determination. The present occupation and military government of Japan involve many delicate and complex strands in the web of our current relations with the rest of the world community, and serious harm may follow a holding, or even an intimation, that the Military Tribunal is not the international enterprise the participating countries have taken it to be. For the Court to

assume an "antagonistic jurisdiction" (*United States* v. *Lee*, 106 U. S. 196, 209) or even to evoke an "irreconcilable difference between the executive and judicial departments" (*Williams* v. *Suffolk Ins. Co.*, 13 Pet. 415, 420) would, in all probability undermine the position of the country, not only in the conduct of its relations with the other powers interested in the Japanese occupation, but in the whole realm of its international dealings.

b. There is no occasion, in the present case, to formulate qualifications guarding against capricious or tyrannical abuse by the executive of the power of certification we advocate. For, in the words of Mr. Justice Jackson's statement of December 6th, the International Military Tribunal "bears the outward appearance of an international enterprise." We show below (*infra*, pp. 44-68) that this was also its true and essential nature, but, at the least, there are sufficient persuasive indicia to demonstrate that the State Department's characterization is neither arbitrary, malevolent, nor *ad hoc:* the Tribunal's members represent eleven different nations; its charter was established by the Supreme Commander for the Allied Powers in conformity with a policy decision of the Far Eastern Commission, an international body composed of the same eleven countries; the indictment charging petitioners was brought in the express name of the eleven powers

and lodged by counsel specifically and separately "acting in behalf" of each country.

2. The legal nature of the Tribunal

If the Court chooses to examine the nature and status of the International Military Tribunal for itself, its conclusion should accord with that of the State Department. The trial at which petitioners were convicted was, as part of the conduct of the war, a wholly international undertaking.

a. *The international control of Japan.*—(1) *The Potsdam Declaration and the surrender.*—In the Potsdam Declaration of July 26, 1945, the Presidents of the United States and of China, and the Prime Minister of Great Britain, proclaimed their nations' terms for the surrender of Japan.[7] (Documentary Appendix, pp. 1–3.) It was announced that until a new order had been established in Japan and until there is convincing proof that Japan's war-making power is destroyed, "points in Japanese territory to be designated by the Allies shall be occupied to secure the achievement of the basic objectives we are here setting forth." As soon as the objectives stated in the Declaration were accomplished, "the occupying forces of the Allies shall be withdrawn from Japan."[8] The Japanese Govern-

[7] The Soviet Union later adhered to the Potsdam Declaration.

[8] The Potsdam Declaration made it clear that the Allied Powers had no intention or desire to annex any part of the Japanese home islands.

ment, in its notes of August 10 and 14, 1945, accepted the terms of the Potsdam Declaration (cf. *In re Yamashita*, 327 U. S. 1, 10) and also agreed to the condition (transmitted by Secretary Byrnes "on behalf of the Governments of the United States, the United Kingdom, the Union of Soviet Socialist Republics, and China,") that "From the moment of surrender the authority of the Emperor and the Japanese Government to rule the state shall be subject to the Supreme Commander of the Allied powers who will take such steps as he deems proper to effectuate the surrender terms." (Documentary Appendix, pp. 4–9.)

The Instrument of Surrender signed by representatives of the Japanese Emperor and Government, on September 2, 1945, formally accepted the terms of the Potsdam Declaration, surrendered all Japanese armed forces, undertook "for the Emperor, the Japanese Government and their successors to carry out the provisions of the Potsdam Declaration in good faith, and to issue whatever orders and take whatever action may be required by the Supreme Commander for the Allied Powers or by any other designated representative of the Allied Powers for the purpose of giving effect to that Declaration." The Instrument concluded with the statement that "the authority of the Emperor and the Japanese Government to rule the state shall be subject to the

Supreme Commander for the Allied Powers who will take such steps as he deems proper to effectuate these terms of surrender." The surrender was accepted by General MacArthur, "Supreme Commander for the Allied Powers," "for the United States, Republic of China, United Kingdom and the Union of Soviet Socialist Republics, and in the interests of the other United Nations at war with Japan."[9] It was also signed by representatives of nine powers at war with Japan: United States (by Admiral Nimitz), China, United Kingdom, USSR, Australia, Canada, France, The Netherlands, New Zealand. (Documentary Appendix, pp. 11–12.) The Japanese Emperor then issued an imperial rescript directing compliance with the surrender terms. (Documentary Appendix, pp. 13–14.)

Initial instructions to General MacArthur concerning his role of Supreme Commander were issued to him, on September 6, 1945, by the United States through the Joint Chiefs of Staff, and provided:

> 1. The authority of the Emperor and the Japanese Government to rule the State is subordinate to you as Supreme Com-

[9] General MacArthur had previously been designated, in accordance with the agreement of the United States, the United Kingdom, the USSR and China, as the Supreme Commander for the Allied Powers. (Documentary Appendix, p. 8.) The Instrument of Surrender provided that the term "Allied Powers" referred to these four nations.

mander for the Allied powers. You will exercise your authority as you deem proper to carry out your mission. Our relations with Japan do not rest on a contractual basis, but on an unconditional surrender. Since your authority is supreme, you will not entertain any question on the part of the Japanese as to its scope.

2. Control of Japan shall be exercised through the Japanese Government to the extent that such an arrangement produces satisfactory results. This does not prejudice your right to act directly if required. You may enforce the orders issued by you by the employment of such measures as you deem necessary, including the use of force.

3. The statement of intentions contained in the Potsdam Declaration will be given full effect. It will not be given effect, however, because we consider ourselves bound in a contractual relationship with Japan as a result of that document. It will be respected and given effect because the Potsdam Declaration forms a part of our policy stated in good faith with relation to Japan and with relation to peace and security in the Far East. (Dept. of State Publication 2671, Far Eastern Series 17 ("Occupation of Japan"), pp. 88–9.)

(2) *The Far Eastern Commission and the Allied Council for Japan.*—The position of the Supreme Commander with relation to the Allied Powers was later clarified by the Moscow Agreement of December 1945, acceded to by the For-

eign Ministers of the U. S. S. R., the United Kingdom, and the United States, and with the concurrence of China in its Far Eastern provisions. (Documentary Appendix, pp. 14–20.) By this Agreement, the Supreme Commander for the Allied Powers was to "issue all orders for the implemention of the Terms of Surrender, the occupation and control of Japan, and directives supplementary thereto. In all cases action will be carried out under and through the Supreme Commander who is the sole executive authority for the Allied Powers in Japan."

There was also established a Far Eastern Commission composed of representatives of the nine nations signatory to the Instrument of Surrender, plus India and the Philippine Commonwealth.[10] The Commission's functions were stated in its Terms of Reference to be (Documentary Appendix, p. 15):

> 1. To formulate the policies, principles, and standards in conformity with which the fulfillment by Japan of its obligations under the Terms of Surrender may be accomplished.

[10] Previously, there had been established, on United States initiative, the Far Eastern Advisory Commission, composed of the United States, Australia, Great Britain, Canada, China, France, India, the Netherlands, New Zealand, the Philippine Commonwealth. The Soviet Union refused to participate on the ground that the Commission would be only an advisory body. Department of State Publication 2671, Far Eastern Series 17 ("Occupation of Japan"), pp. 7–8, 67–8.

2. To review, on the request of any member, any directive issued to the Supreme Commander for the Allied Powers or any action taken by the Supreme Commander involving policy decisions within the jurisdiction of the Commission.

3. To consider such other matters as may be assigned to it by agreement among the participating Governments reached in accordance with the voting procedure provided for in Article V–2 hereunder.

Making recommendations with regard to either the conduct of military operations or territorial adjustments was specifically excluded. The Commission is enjoined to "respect existing control machinery in Japan, including the chain of command from the United States Government to the Supreme Commander and the Supreme Commander's command of occupation forces."

The Commission's policy decisions are transmitted to the United States Government, and that Government is responsible for preparing directives in accordance with these decisions and transmitting the directives to the Supreme Commander, who is charged with implementation of the directives expressing the Commission's policy decisions. The Commission takes action by a majority vote, provided that the representatives of the United States, the United Kingdom, the Soviet Union, and China all concur in the action taken (Article V–2 of the Terms of Reference).

The Terms of Reference set forth in the Moscow Agreement also provide that "The United States Government may issue interim directives to the Supreme Commander pending action by the Commission whenever urgent matters arise not covered by policies already formulated by the Commission; provided that any directives dealing with fundamental changes in the Japanese constitutional structure or in the regime of control, or dealing with a change in the Japanese Government as a whole will be issued only following consultation and following the attainment of agreement in the Far Eastern Commission." [11]

[11] The Moscow Agreement also established the Allied Council for Japan, with its seat at Tokyo, "for the purpose of consulting with and advising the Supreme Commander in regard to the implementation of the Terms of Surrender, the occupation and control of Japan, and of directives supplementary thereto." The Council's chairman is the Supreme Commander (or his Deputy) representing the United States; other members represent the U. S. S. R. and China, and one member represents jointly the United Kingdom, Australia, New Zealand and India. The Supreme Commander, "who is the sole executive authority for the Allied Powers in Japan," is to "consult and advise with the Council in advance of the issuance of orders on matters of substance, the exigencies of the situation permitting. His decisions upon these matters shall be controlling." However, "if, regarding the implementation of policy decisions of the Far Eastern Commission on questions concerning a change in the regime of control, fundamental changes in the Japanese constitutional structure, and a change in the Japanese Government as a whole, a member of the Council disagrees with the Supreme Commander (or his Deputy), the Supreme Commander will withhold the issuance of orders on these questions pending agreement thereon in the Far Eastern Commission." (Documentary appendix, pp. 18–20.)

The Commission is also authorized, on request of any member, "to review * * * any directive issued to the Supreme Commander for the Allied Powers or any action taken by the Supreme Commander involving policy decisions within the jurisdiction of the Commission" (Article II–A–2), and the Commission's decision modifying any directive or action is to be regarded as a policy decision (Article III–2).

The Far Eastern Commission first met in Washington on February 26, 1946, and has continued to function since that time. As of December 1, 1948, some fifty policy decisions have been adopted by the Commission, and directives based upon these policy decisions have been transmitted to the Supreme Commander. Prior to the effective establishment of the Commission in February 1946, various United States policy directives had been transmitted to the Supreme Commander for the Allied Powers through the Joint Chiefs of Staff. These directives have been filed with the Commission and have been subject to review and modification, and the Commission has also been authorized to formulate additional policy decisions on subjects within its Terms of Reference. As the Commission's own policy decisions have been made, new implementing directives have been forwarded through the Joint Chiefs of Staff to supersede any previous conflicting directives.

(3) *Status and character of the Supreme Commander for the Allied Powers and of the Japanese Occupation.*—The documents and agreements just summarized undeniably attest the international character of the occupation and control of Japan, as well as the international role of the Supreme Commander. In the words of the very first paragraph of the Preamble to the Far Eastern Commission's Basic Post-Surrender Policy for Japan (issued June 19, 1947): "* * * on September 2, 1945, Japan surrendered unconditionally to the Allied Powers and is now under military occupation by forces of these Powers under the command of General of the Army Douglas MacArthur, Supreme Commander for the Allied Powers." [12] (Dept. of State Publication 2888, Far Eastern Series 24 ("Activities of the Far Eastern Commission") p. 49.)

(i) The Instrument of Surrender proclaimed "the unconditional surrender to the Allied Powers" of the Japanese armed forces, and accepted the clause of the Potsdam Declaration providing for occupation of "points in Japanese territory to be designated by the Allies." This surrender was accepted by the Supreme Commander "for the United States, Republic of China, United Kingdom and the Union of Soviet

[12] The occupation troops in Japan have included units from Australia and other nations, as well as from the United States.

Socialist Republics, and in the interests of the other United Nations at war with Japan," and also, separately, by representatives of nine nations, including Admiral Nimitz as United States representative. (Documentary appendix, pp. 11–12.) The Secretary of State's message to Japan, of August 11, 1945, on behalf of the four Allied Powers, stated it as the Allied position that "the armed forces of the Allied Powers will remain in Japan until the purposes set forth in the Potsdam Declaration are achieved." (Documentary appendix, pp. 6–7.) The Allied character of the occupation, thus established by the Potsdam Declaration and the Instrument of Surrender, has been consistently recognized and maintained. The United States Initial Post Surrender Policy for Japan, approved by the President early in September 1945, stated that the "military occupation of the Japanese home islands * * * shall have the character of an operation in behalf of the principal allied powers acting in the interests of the United Nations at war with Japan." (Dept. of State Publication 2671, Far Eastern Series 17 ("Occupation of Japan"), pp. 74–5.) The Far Eastern Commission's Basic Post-Surrender Policy for Japan (of June 19, 1947), similarly provides that the "occupation shall have the character of an operation in behalf of the Powers that have participated in the war against Japan. The principle of participation in the occupation of

Japan by forces of these nations is affirmed." (Dept. of State Publication 2888, Far Eastern Series 24 ("Activities of the Far Eastern Commission"), pp. 51.)

The highest policy-making agency for the occupation is the Far Eastern Commission, an international organ representing eleven nations, and the Supreme Commander is charged with implementing the directives expressing the Commission's policy decisions. That these directives are, by agreement of the participating nations, transmitted to the Supreme Commander through the United States military chain of command does not convert the occupation into a national undertaking. Nor does the authority of the United States, also derived from the international agreement, to issue certain unilateral directives in the absence of Commission policies, impeach the Allied character of the occupation. International recognition of one nation's prime interest or special responsibility is fully compatible with an international enterprise. And since the occupying forces are military, it is certainly not unnatural to make use of the normal military channels of communication and supervision. Before issuing his own orders (on matters of substance) for the implementation of the Terms of Surrender, the occupation and control of Japan, and the supplementary directives, the Supreme Commander is required, by the Allied agreement, to

consult and advise with the Allied Council for Japan (see fn. 11, *supra*), if the exigencies of the situation permit. (Documentary Appendix, p. 19.)

(ii) By agreement with the four major nations at war with Japan, General MacArthur was designated Supreme Commander for the Allied Powers, a title which pointedly discloses the international character of his position. He signed the Instrument of Surrender for the Allied Powers and in the interests of the other United Nations at war with Japan. The Moscow Agreement recognized him as "the sole executive authority for the Allied Powers in Japan," and his powers as Supreme Commander stem from an Allied agreement formalized in the Instrument of Surrender, and the Moscow Agreement.[13] He consults regularly, under that Agreement, with the Allied Council for Japan, an international body, and implements the directives which express the policy decisions of the Far Eastern Commission, another Allied organ. He receives directives from the United States Government only in accordance with principles and procedures laid down in the Moscow Agreement. He is in command of the forces of all nations participating in the occupation of Japan.

(iii) It is plain, therefore, that the supreme dominion over Japan now is held, not by the

[13] For the scope of the Supreme Commander's authority, see further *infra*, pp. 60–67.

United States or any single nation, but internationally and jointly by a group of powers. Japan was not conquered by, and did not surrender to, any single state at war with her, but to the Allied Powers, and she is now occupied not by a single nation, but jointly by the Allied Powers, and is controlled by the Supreme Commander for the Allied Powers and the other states represented in the Far Eastern Commission. Under international law, upon a complete surrender like that of Japan, the supreme governmental authority over the conquered or subjugated territory rests with the conquering and occupying power or powers. 3 Hyde, *International Law* (2d rev. ed.) pp. 1879–1880; 7 Moore, *Digest of International Law* (1906), Sec. 1143 ("Occupied Territory and its Administration"); 1 Hackworth, *Digest of International Law* (1940), Sec. 29 ("Military Governments") pp. 144–159, esp. p. 156; *New Orleans* v. *Steamship Co.*, 20 Wall. 387, 393–4; *Dooley* v. *United States*, 182 U. S. 222, 231; *MacLeod* v. *United States*, 229 U. S. 416, 424–5. In the case of Japan and of Germany after World War II, this supreme authority now lies conjointly in a group of states, as with a condominium. Cf. 1 Hackworth, *op. cit. supra*, pp. 56–58; 1 Oppenheim, *International Law* (7th ed., Lauterpacht ed. 1948), Sec. 171, pp. 409–411; Kelsen, *The International Legal Status of Germany to be Established Immediately upon Termi-*

nation of the War (1944) 38 Am. J. Int. Law 689; Kelsen, *The Legal Status of Germany According to the Declaration of Berlin* (1945), 39 Am. J. Int. Law 518. In Germany, the four Allied Powers established the quadripartite Control Council as the supreme legislator and executive for the occupied country, and as the Allies' executive. In Japan, on the other hand, the Allies placed "the sole executive authority for the Allied Powers in Japan" in a single representative, the Supreme Commander, and deposited large policy-making functions with respect to the occupied country in a multipartite body, the Far Eastern Commission. The Supreme Commander happens to be an American Army officer, but the authority under which he functions is international, and not solely American.

b. *The International Military Tribunal for the Far East*—(1) *Basic war crimes policy.*—The apprehension, trial, and punishment of war criminals has been a major war aim and is a part of the basic post-surrender policy of all the nations participating in the war against the Axis. In the words of President Roosevelt, "when victory has been achieved, it is the purpose of the Government of the United States, as I know it is the purpose of each of the United Nations, to make appropriate use of the information and evidence in respect to these barbaric crimes of the invad-

ers, in Europe and in Asia" (9 Dept. of State Bull., No. 214, p. 62, July 31, 1943). In a resolution dealing with Nazi atrocities, Congress declared, early in 1943, that it was its sense "that those guilty, directly or indirectly, of these criminal acts, shall be held accountable and punished in a manner commensurate with the offenses for which they are responsible." Conc. Res. of March 18, 1943, 57 Stat. 721.

In the Tripartite Declaration of Moscow on German Atrocities in 1943 (9 Dept. of State Bull. 310), the London Agreement and Charter of the International Military Tribunal of August 8, 1945 13 Dept. of State Bull. 222–226), and Allied Control Council Law No. 10 of December 20, 1945, the policy as to the trial and punishment of criminals was established for Germany and her satellites. The Nuremburg trial, and the later subsidiary hearings, resulted.[14]

For Japan, the war crimes policy of the Allied Powers was first suggested in the Cairo Declaration of December 1, 1943, issued by the Presidents of the United States and of China and the Prime Minister of the United Kingdom, which proclaimed that "The Three Great Allies are fight-

[14] Provisions as to the punishment of war criminals were included in the treaties which have been signed between the Axis and Allied Powers: Treaty of Peace with Italy, part 3, article 45; Treaty of Peace with Bulgaria, article 5; Treaty of Peace with Hungary, article 6; Treaty of Peace with Rumania, article 6; Treaty of Peace with Finland, article 9.

ing this war to restrain and punish the aggression of Japan." The policy was formally stated in the Potsdam Declaration, announcing as one of the terms of Japanese surrender that "* * * stern justice shall be meted out to all war criminals, including those who have visited cruelties upon our prisoners." Japan agreed to the Potsdam terms, including the provision as to war criminals, on August 10 and 14, 1945, and the Instrument of Surrender definitively stipulated the acceptance and fulfillment of these terms. Cf. *In re Yamashita*, 327 U. S. 1, 13.

(2) *Fundamental authority of the Supreme Commander to establish the Tribunal.*—The Supreme Commander's basic authority to provide for the trial of war criminals is grounded in the Potsdam Declaration, the declaration of the Allied powers transmitted by Secretary Byrnes to the Japanese Government on August 11, 1945,[15] and the Instrument of Surrender. Potsdam declared, as one of the proposed surrender terms, that war criminals would be punished; the Secretary's note and the Surrender Instrument signalized the agreement of the Allies that the Supreme

[15] In this note, delivered on behalf of the four powers after Japan's initial acceptance of the Potsdam terms, it was declared that "From the moment of surrender the authority of the Emperor and the Japanese Government to rule the state shall be subject to the Supreme Commander of the Allied Powers who will take such steps as he deems proper to effectuate the surrender terms." (Documentary appendix, p. 6.)

Commander was to effectuate the surrender terms; and the latter document formally incorporated the surrender terms and endowed the Supreme Commander with authority "to take such steps as he deems proper to effectuate these terms of surrender." The early instructions to the Supreme Commander (September 6, 1945) from the United States Government, clarifying his authority (*supra*, pp. 46–47), stated that his authority in Japan was supreme, and that he was to exercise his authority as he deemed proper to carry out his mission. Emphasis was laid upon the Supreme Commander's "right to act directly if required." "Full effect" was to be given to "the statement of intentions contained in the Potsdam Declaration." At Moscow, in December 1945, the four Allied Powers agreed that "the Supreme Commander shall issue all orders for the implementation of the Terms of Surrender, the occupation and control of Japan, and directives supplementary thereto," and that he was "the sole executive authority for the Allied Powers in Japan." (Documentary appendix, p. 19.)

Early in October 1945 the United States Government issued a directive embodying the Policy of the United States in Regard to the Apprehension and Punishment of War Criminals in the Far East. This directive expressly envisaged the creation by the Supreme Commander, with the

participation of other nations, of special international military courts composed of representatives of two or more of the United Nations, which would have international character and be appointed under international authority.[16] The directive was transmitted to the other Allied Powers and interested nations represented in the Far Eastern Advisory Commission (*supra*, fn. 10), and their participation in the establishment of a proposed international tribunal was suggested.[17]

(3) *Establishment of the Tribunal.*—After consultation with the nine nations which had signed the Instrument of Surrender, the Supreme Commander, acting under the authority we have described and "in order to implement the Terms of Surrender which requires the meting out of stern justice to war criminals," proclaimed (on

[16] In addition, the United States' Initial Post-Surrender Policy for Japan, transmitted to the Supreme Commander on September 6, 1945, declared, for the Supreme Commander's guidance, that "Persons charged by the Supreme Commander or appropriate United Nations agencies with being war criminals, including those charged with having visited cruelties upon United Nations prisoners or other nationals, shall be arrested, tried and, if convicted, punished" (Dept. of State Publication 2671, Far Eastern Series 17 ("Occupation of Japan"), p. 77).

[17] This directive contemplated that the Supreme Commander would obtain further authority before establishing a particular international court, and such authority was in fact later conferred.

January 19, 1946) the establishment of the International Military Tribunal for the Far East "for the trial of those persons charged individually or as members of organizations, or in both capacities, with offenses which include crimes against peace." (Documentary appendix, pp. 20–22.) On the same day, he approved the Tribunal's Charter, setting forth its constitution, jurisdiction, and functions. Judges representing and nominated by each of the nine signatory nations were appointed on February 15, 1946 by the Supreme Commander. (Documentary appendix, pp. 46–7.) By its Charter, the tribunal was to have jurisdiction to try crimes against peace, conventional war crimes, and crimes against humanity. (Documentary appendix, pp. 22–31.)

(4) *Far Eastern Commission War Crimes Policy Decision and Confirmation of the Supreme Commander's Authority.*—On April 3, 1946, the Far Eastern Commission adopted a policy decision on the Apprehension, Trial and Punishment of War Criminals in the Far East. (Documentary appendix, pp. 31–37.) This policy decision defined "war crimes" in terms substantially identical with those of the Nuremburg tribunal as follows:

> 1. The term "war crimes" as used herein, includes:
>
> *a.* Planning, preparation, initiation or waging of a war of aggression or a war

in violation of international treaties, agreements and assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.

b. Violations of the laws or customs of war. Such violations shall include but not be limited to murder, ill treatment or deportation to slave labor or for any other purpose of civilian population of, or in, occupied territory, murder or ill treatment of prisoners of war or persons on the seas, or elsewhere improper treatment of hostages, plunder of public or private property, wanton destruction of cities, towns or villages or devastation not justified by military necessity.

c. Murder, extermination, enslavement, deportation and other inhumane acts committed against any civilian population, before or during the war or prosecutions on political, racial or religious grounds in execution of or in connection with any crime defined herein whether or not in violation of the domestic law of the country where perpetrated.

2. The offense need not have been committed after a particular date to render the responsible party or parties subject to arrest but, in general, should have been committed since, or in the period immediately preceding the Mukden incident of September 18, 1931. The preponderance of cases may be expected to relate to the years since the Lukouchiao incident of July 7, 1937.

With respect to international military tribunals, the policy decision provided:

> 5. The Supreme Commander for the Allied Powers should have:
>
> (a) power to appoint special international military courts (which term should be held to include tribunals of any type) composed of military, naval, or air force officers or civilians representing any two or more of the states members of the Far Eastern Commission for the trial under any applicable law, domestic or international, including the laws and customs of war, of the Far Eastern war criminals indicted by the Governments of these states, and
>
> (b) power to prescribe, subject to consultation with the representatives of those governments, rules of procedure for such courts. *The Supreme Commander shall appoint to each international court a judge nominated by each state represented on the Far Eastern Commission which signifies its desire to participate in the work of such court. In the appointment of the international courts and in all trials before them, the international character of the courts and of the authority by which they were appointed and under which they act should be properly emphasized and recognized, particularly in dealings with the Japanese people.* The Supreme Commander for the Allied Powers should have, (1) the respon-

> sibility for carrying out the judgments of any international courts appointed by him, and (2) the power to approve, reduce or otherwise alter any sentences imposed by any such courts, but not to increase the severity thereof, after consultation with the Allied Council for Japan and the Representatives in Japan of the other Powers, members of the Far Eastern Commission. [Italics supplied.]

The heavy stress on the international composition and character of these courts was deliberate and significant. Responsibility for carrying out the international court's judgment was given to the Supreme Commander ("the sole executive authority for Allied Powers in Japan," under the Moscow Agreement), but any approval or modification of the sentences was to be made only after consultation with the Allied Council for Japan and representatives of other nations interested in the occupation.

A directive based on the Commission's war crimes policy decision was transmitted to the Supreme Commander, through the Joint Chiefs of Staff, and on April 26, 1946, the Supreme Commander repealed the original Charter of the International Military Tribunal for the Far East and promulgated a charter revised so as to comply with this directive. As the charter was amended,

the Tribunal was to consist of not less than six members nor more than eleven members, appointed by the Supreme Commander for the Allied powers from the names submitted by the Signatories to the Instrument of Surrender, India, and the Commonwealth of the Philippine."[18] A Chief of Counsel designated by the Supreme Commander was to be responsible for the investigation and prosecution of charges against war criminals within the jurisdiction of the Tribunal, and any United Nations with which Japan had been at war was privileged to appoint an Associate Counsel to assist the Chief of Counsel. The definition of war crimes in the amended charter was in accordance with the definition of war crimes adopted by the Far Eastern Commission. (Documentary Appendix, pp. 37–46.)

(5) *Petitioners' trial before the International Military Tribunal.*—Petitioners' trial was conducted under the revised charter, before a tribunal of eleven members representing the eleven powers. The indictment, which was lodged on April 29, 1946, was brought in the name of these powers, and signed by the Chief of Counsel, acting on behalf of the United States, and by associate counsel each acting on behalf of one of the

[18] This amendment necessitated the appointment of additional judges nominated by India and the Philippines.

other ten participating nations.[19] (Documentary Appendix, pp. 49–79.) Each of the accused appointed American and Japanese counsel to represent him. The trial—including hearings on pleas and motions; the presentation of evidence, and argument—lasted from May 3, 1946 until April 16, 1948. The Tribunal's judgment was delivered in November 1948.

The record of petitioners' trial was transmitted directly to the Supreme Commander, as the Charter required. After consultation, in accordance with the Far Eastern Commission's war crimes policy decision, with the Allied Council for Japan and Representatives in Japan of the other powers which are members of the Far Eastern Commis-

[19] After a preliminary historical statement, the indictment declared:

"Therefore, the above named Nations by their undersigned representatives, duly appointed to represent their respective Governments in the investigation of the charges against and the prosecution of the Major War Criminals, pursuant to the Potsdam Declaration of the 20th July, 1945, and the Instrument of Surrender of the 2d September, 1945, and the Charter of the Tribunal, promulgated by the Supreme Commander for the Allied Powers on 19th January, 1946 and amended 26th April, 1946, hereby accuse as guilty, in the respects hereinafter set forth, of Crimes against Peace, War Crimes, and Crimes against Humanity, and of Common Plans or Conspiracies to commit those Crimes, all as defined in the Charter of the Tribunal, and accordingly name as the accused in this cause and as indicted on the Counts hereinafter set out in which their names respectively appear, all the above-named individuals." (Documentary Appendix, p. 52.)

sion, the Supreme Commander approved the sentences and ordered that they be carried out.

In his confirmation of the sentences, the Supreme Commander said, referring to the foundation of his authority: "In so far as my own authority extends in this case, suffice it that under the principles and procedure prescribed in full detail by the Allied Powers concerned, I can find nothing of technical commission or omission in the incidents of the trial itself of sufficient import to warrant my intervention in the judgments which have been rendered."

(6) *Summary and Conclusion.*—We have set forth, with but little argument, the materials disclosing the character of the Tribunal and the sources of the Supreme Commander's authority to establish it, because the documents themselves present the most powerful demonstration that the International Military Tribunal for the Far East is a true international court, properly established by the Supreme Commander—as the "sole executive authority for the Allied Powers in Japan" and pursuant to the governing policy declared by the Far Eastern Commission—in order to implement the surrender term concerning war crimes which was proclaimed on behalf of the Allied Powers at Potsdam. As both the original United States war crimes directive and the Far Eastern Commission's policy decision on war crimes require, the Tribunal has an international character

and the authority by which it was appointed and under which it has acted is international. As the judgment of the Tribunal put it: "This is a special Tribunal set up by the Supreme Commander under the authority conferred on him by the Allied Powers." In approving petitioners' sentences and in ordering that they be carried out, the Supreme Commander again acted as "the sole executive authority for the Allied Powers in Japan", and pursuant to responsibility expressly placed upon him by the Far Eastern Commission.[20]

B. NATIONAL COURTS CANNOT REVIEW THE JUDGMENT OR SENTENCES OF THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST, OR ANY ACTION TAKEN TO CARRY OUT ITS JUDGMENT OR SENTENCES.

These enemy aliens have been judged and sentenced as war criminals by an international tribunal sitting in occupied Japan. In praying for writs of *habeas corpus* from this Court, they petition a domestic court of one of the nations represented in the international court to review, revise, and set aside the judgment and the sentences promulgated against them. They ask this domestic court to find that they were improperly

[20] Without question, the President of the United States could not reprieve or pardon petitioners under his constitutional power "to grant reprieves and pardons for offenses against the United States."

charged and convicted by the international court of non-existent or *ex post facto* crimes, and that their trial was biased and unfair. In undertaking a review of the convictions, this Court would necessarily have to apply either the Constitution and laws of the United States to the authority and proceedings of the International Tribunal, or it would have to impose its own views of the proper international law thought to have been misapplied by that Tribunal. We believe that is its undisputably beyond the competence of any American court—or of any national court in any country—to take either course.[21]

1. Since the International Military Tribunal was not established under American law, or pursuant to American authority, but draws its life wholly from international agreements and cooperative undertakings respecting the occupation of Japan, it cannot be bound by or subject to any national law or national court. Its source of power and authority is independent of the domestic law of the eleven participating states,

[21] Generals Yamashita and Homma were tried in the Philippine Islands, which were then under American sovereignty, by American military commissions appointed by the Commanding General of the United States Army Forces, Western Pacific, at the direction of the Commander-in-Chief, United States Army Forces, Pacific. The government did not contend in those cases (*In re Yamashita*, 327 U. S. 1; *Homma* v. *Patterson*, 327 U. S. 759) that the trials were held by international tribunals or under international authority.

and the sovereign which created it is separate and distinct from any of these nations.

Under traditional principles, "every sovereign state is bound to respect the independence of every other sovereign state, and the courts of one country will not sit in judgment on the acts of the government of another done within its territory." *Underhill* v. *Hernandez,* 168 U. S. 250, 252; *Oetjen* v. *Central Leather Co.,* 246 U. S. 297, 303–304; *Ricaud* v. *American Metal Co.,* 246 U. S. 304, 305–310; *United States* v. *Belmont,* 301 U. S. 324, 327–8; *United States* v. *Pink,* 315 U. S. 203, 233; *Luther* v. *Jones Sagor & Co.,* [1921] 3 K. B. 532; *American Banana Co.* v. *United Fruit Co.,* 213 U. S. 347, 357–9. And, as a "necessary corollary," our courts "will not undertake to pass upon the validity under the municipal law of another state of the acts of officials of that state, purporting to act as such." *Bernstein* v. *Van Heyghen Freres Societe Anonyme,* 163 F. 2d 246, 249 (C. A. 2), certiorari denied, 332 U. S. 772.

So as not to "imperil the amicable relations between governments and vex the peace of nations", (246 U. S. at 304) the courts refuse to examine the validity of governmental acts of a foreign nation within its own jurisdiction, even though the complaint be that of American citizens. Immeasurably more fitting and necessary is the application of the same principle to the authority,

judgments and proceedings of an international court trying enemy aliens in enemy territory under international control. For a national court to adopt an "antagonistic jurisdiction" (106 U. S. at 209; 318 U. S. at 588) and to "sit in judgment" (168 U. S. at 253) on the Tribunal's power or actions, or for the Tribunal's proceedings "to be reexamined and perhaps condemned by the courts" (246 U. S. at 304) of a participating nation would be a far more troublesome assumption of competence, in far-reaching effect, than any involving the acts of single foreign states. Once it is suggested that American courts may review the judgments of an international court or pass upon the actions of an international authority's agents, most unhappy consequences can be anticipated in the development of international affairs. Other nations cannot be expected to agree to the establishment of international courts if our domestic courts declare themselves authorized to review their holdings, on *habeas corpus* or otherwise. And if American courts arrogate such power to themselves, there is nothing to gainsay a similar competence in the courts of all other nations. Peaceful and judicial settlement of international disputes, as well as the continued growth of world law, is certain to be adversely affected. Other cooperative endeavors in which Americans are employed as agents of international bodies, such as United

Nations activities, will also suffer.[21a] The full reach of any assumption by this Court of competence in these matters cannot now be foreseen, but we emphasize the government's deep concern lest irreparable damage be done, and its hope for a complete and prompt termination of these efforts by petitioners to hamper and defeat vital international engagements.

2. The same considerations evoke application of the doctrine that our courts have no power, under the Constitution, to decide political questions directly involving relations between the United States and other nations. "The conduct of the foreign relations of our government is committed by the Constitution to the Executive and Legislative—the political—Departments of the Government, and the propriety of what may be done in the exercise of this political power is not subject to judicial inquiry or decision." *Oetjen* v. *Central Leather Co.*, 246 U. S. 297, 302.[22]

[21a] To illustrate, the General Assembly of the United Nations has unanimously affirmed "the principles of international law recognized by Charter of the Nurnberg Tribunal and the judgment of the Tribunal." At the same time, the General Assembly took note "of the fact that similar principles have been adopted in the Charter of the International Military Tribunal for the trial of the major war criminals in the Far East, proclaimed at Tokyo on 19 January 1946". General Assembly Resolution 95 (1) of December 11, 1946.

[22] Cf., *Foster* v. *Neilson*, 2 Pet. 253, 307-9, 314; *The Amiable Isabella*, 6 Wheat. 1, 71; *Williams* v. *Suffolk Ins. Co.*, 13 Pet. 415, 420; *United States ex rel. Boynton* v. *Blaine*, 139 U. S.

Here, in the course of its conduct of our international relations the executive has committed the United States to participate with other nations in the control of occupied Japan, and in the trial of Japanese war criminals by an international tribunal. That tribunal has been established under the international authority, and has tried petitioners under its Charter and the principles of law it deems applicable. Petitioners thereupon appeal to this Court, with the claim that the International Military Tribunal had no jurisdiction to try them, that the law it applied was improper, and that its proceedings were unfair. But the political agencies of our government have already passed upon—expressly or by implication—the establishment and authority of the Tribunal and the nature of the crimes it might adjudge; and all the questions petitioners can raise concerning their trial are issues which must be left to the political branches if it is to carry on its Constitutional functions of determining the course of this nation's relations with

306, 320–326; *Frelinghuysen* v. *Key*, 110 U. S. 63; *La Abra Silver Mining Co.* v. *United States*, 175 U. S. 423; *Terlinden* v. *Ames*, 184 U. S. 270, 288; *Charlton* v. *Kelly*, 229 U. S. 447, 476; *United States* v. *Curtiss-Wright Corp.*, 299 U. S. 304; *Coleman* v. *Miller*, 307 U. S. 433, 454, 460; *Z. & F. Assets Realization Corp.* v. *Hull*, 311 U. S. 470, affirming 114 F. 2d 464 (App. D. C.); *United States* v. *Pink*, 315 U. S. 203; *Ex parte Peru*, 318 U. S. 578, 588–590; *Chicago & Southern Air Lines, Inc.* v. *Waterman Steamship Corp.*, 333 U. S. 103, 111–112

the other countries of the world. A controversy over the jurisdiction and proceedings of an international court for the trial of enemy war criminals is surely within the most exacting bounds of the types of questions confided by the Constitution exclusively to the political departments. Cf. *Z. & F. Assets Realization Corp.* v. *Hull*, 311 U. S. 470; *Frelinghuysen* v. *Key*, 110 U. S. 63; *United States ex rel. Boynton* v. *Blaine*, 139 U. S. 306; *La Abra Silver Mining Co.* v. *United States*, 175 U. S. 423 (awards of mixed claims commissions).[23]

3. Our own history as a federal nation furnishes a fruitful analogy.[24] When a state court, in the middle of the nineteenth century, attempted to review and revise, by writ of habeas corpus, the conviction by a federal court of a resident and citizen of the state, on the ground that the federal court's judgment was founded on an invalid statute, the Court was quick to strike down the intrusion. *Ableman* v. *Booth*, 21 How. 506.[25]

[23] See, especially, the opinion of the Court of Appeals for the District of Columbia in *Z. & F. Assets Realization Corp.* v. *Hull*, 114 F. 2d 464, and the concurring opinion in this Court, 311 U. S. at 490–3, expressly stating that the courts were without power to determine whether the Mixed Claims Commission, United States and Germany, made an award beyond its jurisdiction.

[24] Cf. Van Doren, *The Great Rehearsal*.

[25] The Wisconsin Supreme Court placed its decision largely on the state's essential power to protect the liberty of its citizens. *In re Booth*, 3 Wis. 157, 176–7, 103–4.

Chief Justice Taney's celebrated comments are peculiarly appropriate to the relationship between international and national courts:

> If the judicial power exercised in this instance has been reserved to the States, no offence against the laws of the United States can be punished by their own courts, without the permission and according to the judgment of the courts of the State in which the party happens to be imprisoned; for, if the Supreme Court of Wisconsin possessed the power it has exercised in relation to offences against the act of Congress in question, it necessarily follows that they must have the same judicial authority in relation to any other law of the United States; and, consequently, their supervising and controlling power would embrace the whole criminal code of the United States, and extend to offences against our revenue laws, or any other law intended to guard the different departments of the General Government from fraud or violence. And it would embrace all crimes, from the highest to the lowest; including felonies, which are punished with death, as well as misdemeanors, which are punished by imprisonment. And, moreover, if the power is possessed by the Supreme Court of the State of Wisconsin, it must belong equally to every other State in the Union, when the prisoner is within its territorial limits; and it is very certain that the State courts would not always

agree in opinion; and it would often happen, that an act which was admitted to be an offence, and justly punished, in one State, would be regarded as innocent, and indeed as praiseworthy, in another.

It would seem to be hardly necessary to do more than state the result to which these decisions of the State courts must inevitably lead. It is, of itself, a sufficient and conclusive answer; for no one will suppose that a Government which has now lasted nearly seventy years, enforcing its laws by its own tribunals, and preserving the union of the States, could have lasted a single year, or fulfilled the high trusts committed to it, if offences against its laws could not have been punished without the consent of the State in which the culprit was found. [21 How. at 514–5.][26]

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[26] The Court goes on to say:

"The judges of the Supreme Court of Wisconsin do not distinctly state from what source they suppose they have derived this judicial power. There can be no such thing as judicial authority, unless it is conferred by a Government or sovereignty; and if the judges and courts of Wisconsin possess the jurisdiction they claim, they must derive it either from the United States or the State. It certainly has not been conferred on them by the United States; and it is equally clear it was not in the power of the State to confer it, even if it had attempted to do so; for no State can authorize one of its judges or courts to exercise judicial power, by *habeas corpus* or otherwise, within the jurisdiction of another and independent Government. And although the State of Wisconsin is sovereign within its territorial limits to a certain extent, yet that sovereignty is limited and restricted by the Constitution of the United States. And the powers of the

Once the "State judge or court [is] judicially apprised that the party is in custody under the authority of the United States, they can proceed no further. They then know that the prisoner is within the dominion and jurisdiction of another government, and that neither the writ of *habeas corpus*, nor any other process issued under State Authority, can pass over the line of division between the two sovereignties. He is then within the dominion and exclusive jurisdiction of the United States. If he has committed an offense against their laws, their tribunals alone can punish him. If he is wrongfully imprisoned, their judicial tribunals can release him and afford him redress." 21 How. at 523.

Tarble's Case, 13 Wall. 397, reaffirmed this fundamental principle and applied it to forbid a state court from inquiring, on habeas corpus, into the Army's jurisdiction over a soldier held within

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General Government, and of the State, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. And the sphere of action appropriated to the United States is as far beyond the reach of the judicial process issued by a State judge or a State court, as if the line of division was traced by landmarks and monuments visible to the eye. And the State of Wisconsin had no more power to authorize these proceedings of its judges and courts, than it would have had if the prisoner had been confined in Michigan, or in any other State of the Union, for an offence against the laws of the State in which he was imprisoned." (21 How. at 515–6).

its borders.[27] And it was expressly held that the state court's jurisdiction closed once it appeared that the prisoner was held "under claim or color" of authority of the United States, whatever the real validity of the detaining officer's claim. 13 Wall. at 409, 410–11, 412.

4. It makes no difference, for review of the International Military Tribunal's judgment, that Generals MacArthur and Walker are American army officers. So far as petitioners are concerned, these respondents are acting under inter-

[27] "Neither government can intrude within the jurisdiction, or authorize any interference therein by its judicial officers with the action of the other. The two governments in each State stand in their respective spheres of action in the same independent relation to each other, except in one particular, that they would if their authority embraced distinct territories. That particular consists in the supremacy of the authority of the United States when any conflict arises between the two governments. * * * Such being the distinct and independent character of the two governments, within their respective spheres of action, it follows that neither can intrude with its judicial process into the domain of the other, except in so far as such intrusion may be necessary on the part of the National Government to preserve its rightful supremacy in cases of conflict of authority. In their laws, and mode of enforcement, neither is responsible to the other. How their respective laws shall be enacted; how they shall be carried into execution; and in what tribunals, or by what officers; and how much discretion, or whether any at all shall be vested in their officers, are matters subject to their own control, and in the regulation of which neither can interfere with the other." 13 Wall. at 406–408. Cf. *Covell* v. *Haymore*, 111 U. S. 176, 183; *Robb* v. *Connolly*, 111 U. S. 624, 630–4; *Claflin* v. *Houseman*, 93 U. S. 130, 137.

national, and not solely American, authority, and they hold petitioners under the judgment of the Tribunal, and in accordance with its Charter and the Far Eastern Commission's policy decision on war crimes, which placed in the Supreme Commander "the responsibility for carrying out the judgments of any international courts appointed by him". *supra*, pp. 63–4. The judgment of the International Military Tribunal at Nuremberg would hardly become reviewable in our courts because Goering and the other defendants were held in the Nuremberg jail (in the American Zone of Germany) by American army officers. The participation of American officers or civilians in the activities of the United Nations, and its affiliated bodies, does not render their actions reviewable domestically. As yet, international bodies must act through nationals of one or another state, but it is plain that national jurisdiction cannot hinge on this inescapable fact.

IV

The President, as Commander in Chief, and in the Conduct of Foreign Affairs, Had Power Under the Constitution To Join With the Allied Nations in Establishing the International Military Tribunal for the Far East

The action of the United States in joining with ten other nations to establish the International

Military Tribunal for the Far East was taken pursuant to the authority of the President under the Constitution, Art. II, Sec. 2, as "Commander in Chief of the Army and Navy of the United States," and as the organ of the United States in the field of foreign relations. The President's power to take such action, and the petitioners' detention pursuant to the judgment of that Tribunal, are here challenged by the petitioners on the following grounds: (1) the President possesses no power to enter into an agreement with other nations to define and punish offenses against the law of nations because the Constitution, Art. I, Sec. 8, vests that power exclusively in the Congress; and (2) that the definition of "Crimes against Peace" in the Charter of the International Military Tribunal for the Far East, as applied to the earlier acts of the petitioners, violates the command of the Constitution, Art. I, Sec. 9, that no *ex post facto* law shall be passed. Before discussing these contentions, it will be appropriate to review the nature and scope of the President's constitutional powers as Commander in Chief in time of war, and particularly in the government of occupied enemy territory, and in the conduct of relations with other nations.

Under the Constitution, the President as Commander in Chief is not limited in his powers to those of a troop commander. To the contrary, the powers which he may exercise over occupied

enemy territory have been broadly described by this Court in *New Orleans* v. *Steamship Co.*, 20 Wall. 387, 394, as follows:

> * * * In such cases the conquering power has a right to displace the pre-existing authority, and to assume to such extent as it may deem proper the exercise by itself of all the powers and functions of government. It may appoint all the necessary officers and clothe them with designated powers, larger or smaller, according to its pleasure. It may prescribe the revenues to be paid, and apply them to its own use or otherwise. It may do anything necessary to strengthen itself and weaken the enemy. There is no limit to the powers that may be exerted in such cases, save those which are found in the laws and usages of war. * * *

The vesting of these powers in the President as Commander in Chief and in his subordinate military commanders has been summarized as follows:

> * * * Congress having, under its constitutional powers, declared or otherwise initiated the state of war, and made proper provision for its carrying on, the efficient prosecution of hostilities is devolved upon the President as Commander-in-chief. In this capacity, unless Congress shall specially otherwise provide, it will become his right and duty to exercise military government over such portion of the country of the enemy as may pass into the possession of

> his army by the right of conquest. In such government the President represents the sovereignty of the nation, but as he cannot administer all the details, he delegates, expressly or impliedly, to the commanders of armies under him the requisite authority for the purpose. Thus authorized, these commanders may legally do whatever the President might himself do if personally present, and in their proceedings and orders are presumed to act by the President's direction or sanction. [Winthrop, *Military Law and Precedents* (1920), p. 801.]

This statement is supported by such decisions of this Court as *Cross* v. *Harrison*, 16 How. 164; *Hamilton* v. *Dillin*, 21 Wall. 73; *Mechanics' & Traders' Bank* v. *Union Bank*, 22 Wall. 276; *Gates* v. *Goodloe*, 101 U. S. 612, 617.

More specifically it has been repeatedly held that the President and his military commanders may establish courts not provided for by the Articles of War and confer upon these courts civil and criminal jurisdiction. *Leitensdorfer* v. *Webb*, 20 How. 176; *The Grapeshot*, 9 Wall. 129; *Mechanics' & Traders' Bank* v. *Union Bank*, 22 Wall. 276.

The President's powers as Commander in Chief to deal with the conquered territory and enemies stem from the inherent purposes of the conduct of war and the occupation of enemy territory. "An important incident to the conduct of war is the adoption of measures by the military com-

mand not only to repel and defeat the enemy, but to seize and subject to disciplinary measures those enemies who, in their attempt to thwart or impede our military effort, have violated the law of war." *Ex parte Quirin*, 317 U. S. 1, 28–29; *In re Yamashita*, 327 U. S. 1, 11. The President's power with respect to the conquered territory "carries with it inherently the power to guard against the immediate renewal of the conflict." *Stewart* v. *Kahn*, 11 Wall. 493, 507. He may require the destruction of enemy armaments and war industry, he may exact reparations, and he may require the surrender or take into custody the military and political leaders of the conquered nation. A fundamental precaution against revolt or the renewal of the conflict is to seize and hold the military and political leaders with the training and experience to organize and lead such actions.

In brief, a military occupation is not merely a technical state of war in which the war powers may be exercised to cope with the disruptions resulting from the war, as in *Woods* v. *Miller Co.*, 333 U. S. 138.

It is actually a continuation of hostilities—a control of the enemy territory maintained by the continued use or threat of force. The government of occupied territory is as much of a military problem as the conduct of a battle. The occupation of Japan has been relatively peaceful. But history is replete with cases in which the

occupying forces have encountered repeated and desperate revolts. Under our Constitution, in such a situation, the President as Commander in Chief would be solely responsible, so far as the United States is concerned, for the taking of all steps necessary to maintain and protect the military occupation. His responsibility for the conduct of the occupation is complete, and the Constitution must be deemed to confer upon him power commensurate with his responsibility. In military occupation, as on the battlefield, he may take whatever action he considers necessary to our military security. These are political powers the exercise of which by the President or his principal subordinates has always been regarded as unreviewable by the courts. *Mississippi* v. *Johnson,* 4 Wall. 475; *Georgia* v. *Stanton,* 6 Wall. 50. Such determinations must be made in the light of facts which are within the peculiar knowledge of the President and the military commanders—the temper of the conquered people, the past roles of the enemy leaders, the disposition of the American forces, and our relationships with other nations. These are indeed great powers, but they are inherent in the responsibilities which the Constitution imposes on the President as Commander in Chief. Almost universally, such powers are vested in a national executive. It is neither trite nor meaningless to say that the President's responsibility for his exercise of these great powers is entirely political.

In the exercise of his powers as Commander in Chief, and for any of the inherent purposes of military occupation, the President would have had ample authority, so far as this country is concerned, to provide for the indefinite detention of these petitioners without trial. In fact, he could thus have detained them indefinitely outside of Japan, as was done by Great Britain in the case of Napoleon. In fact, he had still other alternatives: he could have turned them over to another country, even with full knowledge, if such were the case, that they might be executed summarily by those governments.

It is not necessary for us to contend that, in a solely American occupation, the President, acting solely as American Commander in Chief could have established a tribunal to try the petitioners for the offenses with which they were charged. Considering the authority of the occupying power under international law, the vesting of that authority in the President under our law, and the limited exercise by Congress of its power with respect to offenses against the law of nations, it would be difficult to argue that the President was without power to so act.

In fact, however, the President did not purport to establish a wholly American tribunal. Instead, he joined with the representatives of ten other nations in establishing an international military tribunal for the trial of war crimes. Of course,

the power of the President, in the exercise of his powers as Commander in Chief, to enter into agreements with other nations respecting the military security of the United States, is unquestioned. Since such agreements relate to matters within his powers as Commander in Chief, they need no other authority. However, it is significant that the President is the sole organ of the United States in the field of foreign relations and as such gives constant expression to the public policy of the United States. In time of war, and particularly with respect to our military allies, the principal task of diplomacy is to further the military effort. From the earliest times, the President has entered into such agreements even in time of peace, and the validity of such agreements has never been successfully challenged on the ground that they might have been made the subject of treaties ratified by the Senate. An early and famous example is the Rush-Bagot Agreement of 1817 limiting naval armaments on the Great Lakes.[28] Similarly, the Presidents have entered into various agreements with Mexico whereby troops of each nation were allowed to cross the borders of the other in pursuit of ma-

[28] President Monroe apparently did not think Senatorial approval of the agreement was necessary, but a year after its execution, he submitted the correspondence to the Senate. The agreement was approved by the Senate by a two-thirds majority, but ratifications were never exchanged. 5 Moore, *A Digest of International Law*, p. 214.

randing Indians. As this Court noted in *Tucker* v. *Alexandroff*, 183 U. S. 424, 435:

> * * * While no act of Congress authorizes the executive department to permit the introduction of foreign troops, the power to give such permission without legislative assent was probably assumed to exist from the authority of the President as commander-in-chief of the military and naval forces of the United States.

In our own time, significant examples of the President's power to enter into such agreements are the Canadian-American defense agreement of 1940,[28a] and the bases-destroyer agreement with Great Britain in 1940[29] (see *Vermilya-Brown* v. *Connell*, decided December 6, 1948, No. 22). In wartime, and particularly in the waging of a coalition war as in World War II, the occasion and necessity for such agreements between military allies is frequent. The subjects of such agreements are often of supreme importance to the nation, yet no one can seriously question the President's power as Commander in Chief to make them. For example, during World War II the allied decision to give priority to the campaign against the European Axis powers was made on behalf of the United States by the President. Similarly, where we have war allies, as in World Wars I and II, the President must and

[28a] 3 Department of State Bulletin, No. 61, p. 154.

[29] See 39 Op. Atty. Gen. 484.

does enter into many arrangements and agreements on behalf of this country for the purpose of achieving effective coordination of the allied forces and resources.

Where we are engaged with allies in war against a common enemy, the necessary coordination of the allied armed forces can be achieved only by unified command. There can be no doubt of the President's power as Commander in Chief to enter into agreements with our allies for a unified command, under either an American officer or under an officer of an allied country (see *infra*, pp. 94-101). A similar act of the President as Commander in Chief was his agreement with our European allies for the division of conquered Germany into zones of occupation and the creation of the Allied Control Council to deal with other problems of the German occupation. The President's authority to enter into agreements providing for unified military operations and for joint allied control of conquered Japan clearly included the power to enter into agreements with our allies on the steps to be taken to prevent renewal of the conflict and to punish the persons guilty of war crimes.

In entering into the agreement to establish the International Military Tribunal for the Far East, the representative of the United States was dealing with other governments. That agreement is inherently a blending or compromise of the poli-

cies of the various participating nations. So, the precise question becomes whether there are limitations in American domestic law which restrict or limit the President's power to enter into an agreement with other nations for the punishment of war crimes, although the other participating nations are not so limited. Almost axiomatically, there are no such limits. "As a member of the family of nations, the right and power of the United States in that [international] field are equal to the right and power of the other members of the international family. Otherwise, the United States is not completely sovereign. * * * the power to make such international agreements as do not constitute treaties in the constitutional sense * * * none of which is expressly affirmed by the Constitution, nevertheless exist as inherently inseparable from the conception of nationality. This the court recognized, and in each of the cases cited found the warrant for its conclusions not in the provisions of the Constitution, but in the law of nations." *United States v. Curtiss-Wright Corp.*, 299 U. S. 304, 318. The point is graphically illustrated by the petitions in the instant cases. The petitioners do not dispute the power and right of the other ten nations represented in the Far Eastern Commission to provide by agreement for the establishment of the International Military Tribunal for the Far East; rather, they challenge only the power of the Pres-

ident to join in that agreement on behalf of the United States. If petitioners are correct, then in this and perhaps other aspects of the military occupation of Japan, the other occupying powers possess powers which this Government may not exercise.

This anomalous result is said to follow from the fact that the Constitution empowers Congress to define and punish offenses against the law of nations. Whatever might be the limit on the President's powers if Congress had ever purported to define exhaustively offenses against the law of nations, the fact remains that Congress has never done so. Thus, there is not involved in this case any conflict between what the President has done and what Congress has prescribed. But more important, the purpose of this clause of the Constitution, Art. I, Sec. 8, was to vest in the Federal government, to the exclusion of the States, the power to define and punish offenses against the law of nations, as an element of the exclusive control over foreign relations to be vested in the national government. Madison, in *The Federalist*, No. 42. That clause was not intended to make offenses against the law of nations definable only by Congress in the form of specific statutes. It cannot be doubted that the United States by a treaty could join with other nations in defining offenses against the law of nations and in prescribing the punishment for such offenses. There

can hardly be a more appropriate subject for international agreement, as Congress has indicated by leaving the definition of the offenses which may be tried by American military commissions "to the rules and precepts of the laws of nations." Indeed, apart from such offenses as piracy, international agreement is inherently the only method by which offenses against the law of nations can be defined. And so this Court has recognized that offenses against the law of nations may be defined in treaties to which this nation is a party. *Ex parte Quirin*, 317 U. S. 1, 27–35; *In re Yamashita*, 327 U. S. 1, 7–8.

It by no means follows, however, that a formal treaty is the only method by which this government may join with other nations in defining and prescribing punishment for offenses against the law of nations arising out of war. The President as the Commander in Chief under the Constitution must have power to determine, in agreement with our military allies, what should be done to carry out the policy of this nation, and the policies of the other participating nations, to punish war criminals. The established policy of the United States is manifest not only from the Potsdam Declaration, but from similar expressions of Congressional sentiment which reflect an assumption that the appropriate powers already exist. In 1943, a concurrent resolution dealing with Nazi atrocities the Senate declared "that it is the sense

of this Congress that those guilty, directly or indirectly, of these criminal acts shall be held accountable and punished in a manner commensurate with the offenses for which they are responsible."[30] In 1945, a similar resolution relating to all war crimes was passed by the House of Representatives.[31] Indeed, as this Court noted in the *Yamashita* case, that policy is embodied in the terms of the Japanese surrender. Moreover, the President took similar action in joining with our European allies in establishing the International Military Tribunal which sat at Nuremberg and the judgments of which have been carried out.

The precise question is whether, at least where Congress has not taken inconsistent action, the President, representing the United States in the allied occupation of Japan, may exercise on behalf of this country as broad powers as the other occupying powers. It is our position that to the extent that offenses against the law of nations relate to the commencement and conduct of war, the President, as Commander in Chief, may enter into agreements with our military allies defining and punishing such offenses. Such power is inherent in his obligations to bring war criminals to justice, to prevent renewal of the conflict and to protect the occupying forces. Whether the President's power in this respect would be

[30] Conc. Res. of Mar. 18, 1943 (57 Stat. 721).

[31] H. Conc. Res. 39, 79th Cong., 1st sess.

limited by the extent to which Congress had exercised its power to define and punish offenses against the law of nations is not in issue. Since Congress has not acted, the only question is whether the President, by agreement with the other governments, may exercise the same powers as to war crimes as are exercised by such other governments. *United States* v. *Curtiss-Wright Corp., supra,* stands for the proposition that the President must exercise on behalf of the United States powers equal to those of the other nations involved, for otherwise the United States would play a subordinate role in determining with other nations matters of great importance.

These same considerations compel the conclusion that the President, in entering into an agreement with other governments for the trial and punishment of war crimes, is not restricted by such limitations of our domestic law as the provision of the Constitution, Art. I, Sec. 9, that "no *ex post facto* law shall be passed." Without in any way conceding that the trial of petitioners violates the *ex post facto* principle of our Constitution, it is our position that that clause has no application here. In the first place, it should be noted that this provision by its terms is limited to legislation—it is a restriction upon the power of Congress to legislate. Also, it is established that the prohibition against *ex post facto* laws is applicable only to criminal statutes, *Calder* v.

Bull, 3 Dallas 386, and presumably this means statutes defining offenses against the United States. The petitioners, of course, were not tried for offenses against the laws of the United States, but for the offenses defined by the agreement of eleven nations. Assuming, therefore, that the President had authority generally to enter into such an agreement, and assuming (what we do not concede) that the definition of such offenses in an act of Congress would violate the *ex post facto* clause of the Constitution, is the President restricted to such agreements as satisfy the prohibition of the *ex post facto* clause? This is a serious issue. An international agreement to define and punish war crimes inherently involves a compromise of the desires and legal policies of the participating nations. This is true whether what is involved is an agreement made by the President as Commander in Chief or a formal treaty. To conclude that the domestic legal policies of the United States must govern the content of any such agreement to which the United States is a party would create intolerable uncertainty as to whether our concurrence was effective. Similarly, if each of the other nations takes the same position, it would probably be impossible for nations to act jointly in the development of international order. In any realistic view, the participation of this country in the agreement for the definition and punishment of war crimes

is a political and military decision to which the *ex post facto* clause of the Constitution by its terms has no more application than it does to the retrospective operation of judicial decisions. See *Ross* v. *Oregon*, 227 U. S. 150.

Of course, the question actually presented is not whether the general principle against retroactive criminal legislation should be applicable to the definition and punishment of war crimes. Even assuming, what may or may not be true, that all civilized legal systems follow this general principle, there is room for much divergence of views on the application of the ex post facto principle to particular circumstances. Thus, petitioners' real contention is that this nation may not participate in an international agreement defining and punishing war crimes except upon the condition that our rule against *ex post facto* criminal legislation is applied in exactly the same way as our courts would apply it to acts of Congress under the same circumstances. It need not be labored that any attempt by the United States to impose such conditions would be resented by other governments and would probably preclude the United States from participating in any such agreements.

The issue is not limited to war crimes or to the *ex post facto* doctrine. If the United States is to participate with other nations in the development of international law generally, it must be

on the basis of compromise and on the assumption that the representatives of other legal systems are as zealous as ourselves in seeking to administer fundamental justice.

V

Even Assuming that the President was Without Power to Join with Other Nations in the Establishment of the International Military Tribunal for the Far East, the Fact Remains that it was Established by 10 Other Nations and that General MacArthur, as Supreme Commander, May Act as Their Agent in Establishing the Tribunal and in Carrying out its Judgments.

Assuming with petitioners that there was no power in the President or any executive or military officers of the United States to participate in the establishment of the International Military Tribunal for the Far East, the following *facts* remain: General MacArthur, acting as Supreme Commander for the Allied Powers, made the petitioners available for trial by the Tribunal, they were tried and sentenced by the Tribunal, and General MacArthur, as Supreme Commander, has directed that the sentences be carried out.

As shown above, the International Military Tribunal for the Far East is not an American tribunal—it is an international tribunal. Even if petitioners are correct in their view as to the lack of executive power to participate in the crea-

tion of the Tribunal, there remains an agreement among the other ten countries associated with this country in the Far Eastern Commission and there still remains the Tribunal created pursuant to that agreement. No American court has jurisdiction to question the validity of the policy decision of the Far Eastern Commission after subtracting therefrom the participation of the United States. The effect of a declaration that American participation was illegal, upon the constitution of the Tribunal and the validity of its proceedings, can not be determined by this Court.

Since there exists, despite any conclusion or action of this Court, an agreement by ten nations other than the United States for the establishment of a tribunal to try Japanese war criminals; petitioner must attack the functions performed by General MacArthur and the American armed forces in the establishment and operation of the International Military Tribunal for the Far East and in the execution of its judgment. These functions consisted of the following: (1) General MacArthur, as Supreme Commander, implemented the international agreements for the trial of war criminals by preparing and issuing the Charter of the International Military Tribunal for the Far East; (2) as Supreme Commander, and pursuant to the Charter, he appointed 11 members of the Tribunal from nominations from the 11 nations (Charter, Art. 2); (3) as Su-

preme Commander, and pursuant to the Charter, he designated a Chief of Counsel to be responsible for the investigation and prosecution of charges against war criminals (Charter, Art. 8 (a)); (4) as Supreme Commander, he made the petitioners, who had previously been arrested by the Allied Forces, available for trial; (5) as Supreme Commander, he approved, pursuant to Article 17 of the Charter, the judgments of the Tribunal; and (6) as Supreme Commander, he has directed that the sentences imposed upon petitioners be carried out.

The performance of these functions by General MacArthur as Supreme Commander is challenged by the petitioners on the ground that in so doing he accepted "an office, title and place of trust from ten (10) foreign governments without consent of the Congress", in violation of the U. S. Const., Art. I, Sec. 9. That clause provides that, "No title of nobility shall be granted by the United States: and no person holding any office of profit or trust under them, shall, without the consent of the Congress, accept of any present, emolument, office, or title, of any kind whatever, from any king, prince, or foreign state."

The war in the Pacific was a coalition war. The attack on Pearl Harbor on December 7, 1941, and the contemporary events found Japan at war not only with the United States but also with Great Britain, China, Netherlands, Aus-

tralia and New Zealand. Similarly, in the recent war with the European Axis powers, we had allies. In the Pacific campaign, unified command of the operations of the Allied Forces was achieved in various ways. In Western Europe, General Eisenhower of the United States Army was the Supreme Allied Commander. It is a fact that the supreme commander in coalition warfare acts for and is responsible to the governments participating in the military coalition. Petitioner's contention, based on the Const., Art. I, Sec. 9, amounts to saying that the Constitution prohibits any American army or naval officer from exercising the supreme command of the armed forces of nations joined with us in war against a common enemy.

This contention is made too late in American history. The nation was born of a military coalition of the original colonies against Great Britain. As early as June 16, 1775, three months after Lexington, the Continental Congress appointed Washington to be "general and commander in chief, of the army of the United Colonies, and of all the forces now raised, or to be raised, by them." *Journals of the American Congress,* 1774–78, Way & Gideon, 1823, pp. 83–85. Six years later, in Article VI of the Articles of Confederation we find almost verbatim the present language of the Constitution, Art. I, Sec. 9, which petitioners assert precludes an

American Army officer from acting as the commander or agent of a military coalition to which the United States is a party. It is absolutely incredible that the same men who recognized the necessity for unified command at the outset of the Revolution intended by this clause to prevent any American from exercising unified command over American troops and troops of other nations allied with us in war. Not until 1918 did the problem of unified command in coalition warfare present itself. Then we did not hesitate to subject American troops to the supreme command of Marshal Foch of the French Army. Art. I, Sec. 9, of the Constitution has never been construed by this Court. It has been construed by the Attorney General in respects not relevant here, and it has been interpreted by Congress in legislation authorizing officers of the United States to accept foreign decorations. See, for example, the Act of July 20, 1942, 56 Stat. 662; 10 U. S. C. 1423a. In the Convention of 1787, the clause was suggested by Charles Pinckney, who "urged the necessity of preserving foreign Ministers, and other officers of the U. S., independent of external influence."[32] Until now, it was never suspected that this purpose of preserving the undivided loyalty of officers of the United States by forbidding their acceptance of honors, compensation or gifts from foreign

[32] Debates, August 23, 1787.

governments, also prohibited any American officer from exercising allied command in a coalition war.

The President, as Commander in Chief of the armed forces of the United States, has undisputed power to select the officers to command the armed forces in time of war. Also as Commander in Chief, and by agreement with allied governments, he may and has designated American officers to act as the Supreme Commander of our own and allied armed forces. Where military allies are fighting together under unified command, the Supreme Commander has the same responsibility for bringing to trial and punishment violators of the laws of war and other war criminals as does the commander of a purely national force.

Since General MacArthur was validly designated by the President, in agreement with our allies, as the Supreme Commander of the Allied Forces, his powers in dealing with the problems arising out of the war are not limited to those which he would possess if he were acting solely as an American military commander. His powers as the agent and representative of the Allied Powers must be as great as those which could be exercised, say, by a British or Australian officer in that position. We assume that if an Australian officer were acting as Supreme Commander for the Allied Forces, he would not consider himself precluded by anything in American domestic law from carrying out

the international agreement embodied in the war crimes policy of the Far Eastern Commission. We assume that General MacArthur acting as Supreme Commander similarly would not feel restrained by any Australian domestic law. In brief, when an American officer assumes the post of Supreme Commander it is inherent in that post that he must carry out the policies of the group of nations involved as determined by whatever voting or other arrangement they have agreed upon. While he acts as their agent, he may not subordinate their policy decisions to the domestic legal rules of his own country. Clearly, therefore, General MacArthur, as the representative of the Allied Powers, may exercise the power delegated by them, without participation by the United States if the latter so desires, to establish an international tribunal for the trial of war crimes as defined by the Allied Powers, and, also as the agent of such Allied Powers, execute the sentences of the tribunal.[33]

[33] It should also be noted that petitioners challenge the Supreme Commander's power to provide "for the trial of 'conventional war crimes in violation of the customs and usages of war' in any court other than a national court or commission." It is enough to point out, as shown earlier in this brief, that the Far Eastern Commission policy decision of April 3, 1946, specifically contemplated that the Supreme Commander would establish an international military tribunal. Accordingly, it is not necessary to argue, although we think it clear, that as an incident of joint military operations and of a joint military occupation the President through military commanders may establish with our allies joint military tribunals for the trial of conventional war crimes.

CONCLUSION

The judgments against the petitioners, enemy aliens, were made by an international tribunal established by agreement among eleven nations. The Supreme Court has no authority to review the actions of such international tribunals.

The President's agreement with our allies to punish the commission of the war crimes charged in the indictments against the petitioners was a military and political decision. This Court has no jurisdiction to review such decisions by the President of the United States as Commander in Chief, made either alone or in concert with the representatives of other nations.

We respectfully submit that the motions for leave to file petitions for writs of habeas corpus should be denied.

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THOMAS H. GREEN,
Major General,
The Judge Advocate General,
United States Army.

DECEMBER, 1948

APPENDIX A

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

CONSTITUTION

Article I, Section 8:

The Congress shall have Power * * *

To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations;

* * *

Article I, Section 9:

* * * * *

No Bill of Attainder or ex post facto Law shall be passed.

* * * * *

No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, without the Consent of the Congress, accept of any present, Emolument, Office, or Title, of any kind whatever, from any King, Prince, or foreign State.

Article II, Section 1:

The executive Power shall be vested in a President of the United States of America.

* * * * *

Section 2:

The President shall be Commander in Chief of the Army and Navy of the United States, and of

the Militia of the several States, when called into the actual Service of the United States.

Article III, Section 2:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between citizens of different States,—between citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

STATUTES

Title 28, U. S. C., Secs. 2241–42

Section 2241. Power to grant writ.

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their

respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had.

(b) The Supreme Court any justice thereof and any circuit judge may decline to entertain an application for a writ of habeas corpus and may transfer the application for hearing and determination to the district court having jurisdiction to entertain it.

(c) The writ of habeas corpus shall not extend to a prisoner unless—

(1) He is in custody under or by color of the authority of the United States or is committed for trial before some court thereof; or

(2) He is in custody for an act done or omitted in pursuance of an Act of Congress, or an order, process, judgment or decree of a court or judge of the United States; or

(3) He is in custody in violation of the Constitution or laws or treaties of the United States; or

(4) He, being a citizen of a foreign state and domiciled therein is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, order or sanction of any foreign state, or under color thereof, the validity and effect of which depend upon the law of nations; or

(5) It is necessary to bring him into court to testify or for trial.

Section 2242. Application.

Application for a writ of habeas corpus shall be in writing signed and verified by the person for whose relief it is intended or by someone acting in his behalf.

It shall allege the facts concerning the applicant's commitment or detention, the name of the person who has custody over him and by virtue of what claim or authority, if known.

It may be amended or supplemented as provided in the rules of procedure applicable to civil actions.

If addressed to the Supreme Court, a justice thereof or a circuit judge it shall state the reasons for not making application to the district court of the district in which the applicant is held.

APPENDIX B

LETTER FROM THE ACTING SECRETARY OF STATE

DEPARTMENT OF STATE,
Washington, December 14, 1948.

In reply refer to
L/M

MY DEAR MR. PERLMAN: You have requested the views of the Department of State as to whether the International Military Tribunal for the Far East is to be regarded as an international court appointed and acting under international authority, or as an American tribunal appointed and acting under the unilateral authority of the United States and specifically whether it regards the action of the Supreme Commander for the Allied Powers in proclaiming the establishment of the International Tribunal for the Far East, approving and amending the charter of that Tribunal, appointing as judges of the Tribunal the persons nominated by the individual governments represented on the Far Eastern Commission, and approving, after consultation, the sentences imposed by the Tribunal, as being in accordance with Paragraph 5 of the Far Eastern Commission policy decision of April 3, 1946, and as taken in accordance with the authority and direction of the Far Eastern Commission.

In answer to your first question, the Department of State regards the International Military Tribunal for the Far East as an international court, appointed and acting under international authority.

The Potsdam Declaration of July 26, 1945 defining the terms for Japanese surrender, issued by the President of the United States, the President of the National Government of the Republic of China, and the Prime Minister of Great Britain stated that "stern justice shall be meted out to all war criminals."

The Supreme Commander for the Allied ~~Forces~~ Powers in Japan was appointed on August 13, 1945 by agreement of the President of the United States and Generalissimo Chiang Kai-shek, Prime Minister Churchill and Premier Stalin. In the view of the Department of State, this action of the President was taken in accordance with his powers as Commander in Chief and in execution of the control vested in him over the conduct of the foreign relations of the United States.

On October 4, 1945, the United States issued a directive to the Supreme Commander for the Allied Powers authorizing him to establish special international military courts for the trial of Far Eastern war criminals, subject to further authorization from the United States Joint Chiefs of Staff, in respect to the establishment of international courts for the trial of persons charged with crimes against peace. Such authorization was subsequently given to him provided that nominations of judges for such tribunal were received from other Governments. The directive of October 4, together with the statement of the policy of the United States on which it was based, was circulated on October 24, 1945 to the Far Eastern Advisory Commission, which preceded the Far Eastern Commission and which was com-

posed of representatives of the United Kingdom, the United States, China, France, the Netherlands, Canada, Australia, New Zealand, India and the Philippine Commonwealth. Previously, on October 18, 1945, the Department of State had also transmitted a copy of the statement of the policy of the United States to the governments signatory to the Japanese surrender, and requested them to designate persons qualified for membership on the international military courts contemplated in order to permit the Supreme Commander for the Allied Powers to appoint suitable members. On January 19, 1946, the Supreme Commander issued a proclamation stating that "there shall be established an International Military Tribunal for the Far East." On the same day, in General Orders No. 1, he approved the charter of the Tribunal, pursuant to which, on February 15, 1946, he appointed judges on the Tribunal.

The Department of State regards the tribunal established pursuant to the Proclamation and General Orders just mentioned as an international tribunal appointed under international authority. In its view, a tribunal appointed by an international officer, consisting of members nominated by the governments which he represents and which at the time of such nomination were fully informed of the directive and statement of policy pursuant to which he acted, is an international tribunal.

In the meantime, by the Moscow Agreement of December 27, 1945, the Far Eastern Commission had been set up by the United States, the United

Kingdom and the Union of Soviet Socialist Republics, with the concurrence of China. On April 3, 1946, the Far Eastern Commission adopted a policy decision regarding the apprehension, trial and punishment of war criminals in the Far East which provided, *inter alia*, that the Supreme Commander of the Allied Powers "should have: (a) power to appoint special international military courts" and that he "shall appoint to each international court a judge nominated by each state represented on the Far Eastern Commission which signifies its desire to participate in the work of such court." The United States Government prepared a directive in accordance with this policy decision which was transmitted on April 23, 1946 to the Supreme Commander through the United States Joint Chiefs of Staff, as provided in Article III–1 of the terms of reference of the Far Eastern Commission. Thereafter, on April 26, 1946, the Supreme Commander issued General Orders No. 20 which specifically "superseded" General Orders No. 1 and incorporated the requirements of the Far Eastern Commission policy decision in regard to the membership of any international court appointed by him which differed from the provisions as to membership set forth in General Orders No. 1. The Tribunal with which the indictment of the major Japanese war criminals was filed and which tried and convicted the accused was the Tribunal constituted pursuant to General Orders No. 20.

Accordingly, in reply to the second question referred to in the first paragraph of this letter, the Department of State considers that the Supreme

Commander's action in proclaiming that an International Military Tribunal for the Far East should be established and in approving the original charter and appointing judges thereunder was taken under international authority, was consistent with the subsequent policy decision of the Far Eastern Commission and was approved by that decision subject only to the requirement of two additional judges. The Department further considers that the Supreme Commander's action superseding the original charter by an amended charter, appointing as judges of the tribunal persons nominated by all of the individual governments represented on the Far Eastern Commission, and approving, after consultation, the sentences imposed by the Tribunal was taken specifically under the authority and policy direction of the Far Eastern Commission.

Sincerely yours,

(Sgd.) ROBERT A. LOVETT.

The Honorable PHILIP B. PERLMAN,
Solicitor General.